

UNITED STATES DEPARTMENT OF THE INTERIOR

Stewart L. Udall, Secretary

Frank J. Barry, Solicitor

**DECISIONS
OF THE
UNITED STATES
DEPARTMENT OF THE INTERIOR**

Edited by
Vera E. Burgin
Mildred B. Harper



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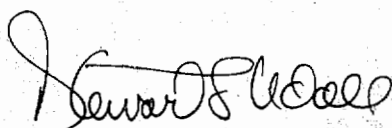
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PREFACE

This volume of Decisions of the Department of the Interior covers the period from January 1, 1967, to December 31, 1967. It includes the most important administrative decisions and legal opinions that were rendered by officials of the Department during the period.

The Honorable Stewart L. Udall served as Secretary of the Interior during the period covered by this volume; Messrs. Charles F. Luce and David S. Black served as Under Secretary; Messrs. Harry R. Anderson, Stanley A. Cain, Frank C. Di Luzio, Kenneth Holum, Robert C. McConnell, and J. Cordell Moore served as Assistant Secretaries of the Interior; Mr. George E. Robinson served as Deputy Assistant Secretary for Administration; Mr. Frank J. Barry served as Solicitor of the Department of the Interior and Mr. Edward Weinberg as Deputy Solicitor.

This volume will be cited within the Department of the Interior as "74 I.D."

A handwritten signature in dark ink, reading "Stewart L. Udall". The signature is fluid and cursive, with the first name "Stewart" being more prominent and the last name "Udall" following in a similar style.

Secretary of the Interior

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ERRATA

Page 18—Line 9, The word *appellent* should be *appellant*.

Page 24—Footnote 42, *Harsed E. Sutton*, should read *Harold E. Sutton*.

Pages 47, 49, 51, 53, 55—*John v. Steffens et al.*, should read *John V. Steffens*.

Page 74—Line 2 "*The Contract also provides as follows.*"¹⁶ should be a 10 point paragraph, instead of 8 point.

Page 75—Footnote 23, Line 2, February 11, 1966, well before most of the acts of trespass complained of Exhibit 19., should read *trespass complained. Exhibit 19.*

Page 94—Line 9, understanding between the contractor and a *complaint inspector*, should read *compliant inspector*.

Page 102—Lines 10 and 11 (43 U.S.C. sec. 315*t*), should read 43 U.S.C. sec. 315*f*.

Page 138—Footnote 5 "Act of February 25, 1920, sec. 17, as amended, 77 Stat. 782 (1960), should read 74 Stat. 781.

Page 182—Footnote 5, *ICBA-376*, should read *IBCA-376*.

Page 209—Topical Index Heading *Reguations: Waiver*, should read *Regulations: Waiver*.

Page 211—Court case Wm. J. *Coleman*, A-30241 (May 7, 1965) should read *Colman*.

Page 215—Paragraph 2, Lines 12 and 13, Court case *Lewis J. A. Bockholt*, etc. should read *Lewis J. H. Bockholt*, etc.

Page 226—Footnote 41, Court case of James P. Cross, Eng. BCA No. 2506, 65-2 BCA par. 4488, should read 4988.

Page 227—Footnote 45, Court case of Herman Groseclose, IBCA-190, 61-1 BCA par. 2885 (1961) should read (1960).

Page 241—Paragraph 4, Line 3—43 CFR 201.60 (now CFR 3381.1) should read 3385.1.

Page 244—Last paragraph—Line 13 after the word "*date.*" add an asterisk (*). The remaining text **By letter of Aug. 23, 1967* should follow after the signature (ed. note).

Page 280—Footnote 103, Line 9, court case Inter-City Sand & Gravel Co. and John Kovtynovich, IBCA-128 (*May 29, 1965*), should read (*May 29, 1959*).

Page 323—Footnote 65, Line 3 (*S (/10/60)*, Government Exhibit No. 11), should read (*S 3/18/60*).

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CUMULATIVE INDEX TO SUITS FOR JUDICIAL REVIEW OF DEPARTMENTAL DECISIONS PUBLISHED IN INTERIOR DECISIONS

The table below sets out in alphabetical order, arranged according to the last name of the first party named in the Department's decision, all the departmental decisions published in the Interior Decisions, beginning with volume 61, judicial review of which was sought by one of the parties concerned. The name of the action is listed as it appears on the court docket in each court. Where the decision of the court has been published, the citation is given; if not, the docket number and date of final action taken by the court is set out. If the court issued an opinion in a nonreported case, that fact is indicated; otherwise no opinion was written. Unless otherwise indicated, all suits were commenced in the United States District Court for the District of Columbia and, if appealed, were appealed to the United States Court of Appeals for the District of Columbia Circuit. Finally, if judicial review resulted in a further departmental decision, the departmental decision is cited. Actions shown are those taken prior to the end of the year covered by this volume.

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John W. Savage v. Stewart L. Udall, Civil Action No. 9458, D. Colo. Order to Close Files and Stay Proceedings, March 25, 1967.

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Alonzo A. Adams et al. v. Paul B. Witmer et al., Civil Action No. 1222-57-Y, S.D. Cal. Complaint dismissed, November 27, 1957 (opinion); reversed and remanded, 271 F. 2d 29 (1958); on rehearing, appeal dismissed as to Witmer; petition for rehearing by Berriman denied, 271 F. 2d 37 (1959).

United States v. Alonzo Adams, Civil Action No. 187-60-WM, S.D. Cal. Judgment for Plaintiff, January 29, 1962 (opinion). Judgment modified, 318 F. 2d 861 (1963). No petition.

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- Administrative Ruling, March 13, 1935; overruled, 58 I.D. 65, 81 (See 59 I.D. 69, 76).
- Alaska Commercial Company (39 L.D. 597); vacated, 41 L.D. 75.
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- Alaska-Dano Mines Co. (52 L.D. 550); overruled so far as in conflict, 57 I.D. 244.
- Aldrich v. Anderson (2 L.D. 71); overruled, 15 L.D. 201.
- Alheit, Rosa (40 L.D. 145); overruled so far as in conflict, 43 L.D. 342.
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- Americus v. Hall (29 L.D. 677); vacated, 30 L.D. 388.
- *Amidon v. Hegdale (39 L.D. 131); overruled, 40 L.D. 259. (See 42 L.D. 557).
- Anderson, Andrew *et al.* (1 L.D. 1); overruled, 40 L.D. 259 (See 42 L.D. 14).
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- Armstrong v. Matthews (40 L.D. 496); overruled so far as in conflict, 44 L.D. 156.
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- *Auerbach, Samuel H. *et al.* (29 L.D. 208); overruled, 36 L.D. 36 (See 37 L.D. 715).
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- Bailey, John W. *et al.* (3 L.D. 386); modified, 5 L.D. 513.
- *Baker v. Hurst (7 L.D. 457); overruled, 8 L.D. 110 (See 9 L.D. 360).
- Barbour v. Wilson *et al.* (23 L.D. 462); vacated, 28 L.D. 62.
- Barbut, James (9 L.D. 514); overruled so far as in conflict, 29 L.D. 698.
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- Bartch v. Kennedy (3 L.D. 437); overruled, 6 L.D. 217.
- Beery v. Northern Pacific Ry. Co. *et al.* (41 L.D. 121); overruled, 43 L.D. 536.
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- Bernardini, Eugene J. *et al.* (62 I.D. 231); distinguished, 63 I.D. 102.
- Big Lark (48 L.D. 479); distinguished, 58 I.D. 680, 682.
- Birkholz, John (27 L.D. 59); overruled so far as in conflict, 43 L.D. 221.

¹ For abbreviations used in this title, see Editor's note at foot of page LV.

- Birkland, Bertha M. (45 L.D. 104); overruled, 46 L.D. 110.
- Bivins *v.* Shelly (2 L.D. 282); modified, 4 L.D. 583.
- *Black, L. C. (3 L.D. 101); overruled, 34 L.D. 608 (See 36 L.D. 14).
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- Braasch, William C. and Christ C. Prange (48 L.D. 448); overruled so far as in conflict, 60 L.D. 417, 419.
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- *Brown, Joseph T. (21 L.D. 47); overruled so far as in conflict, 43 L.D. 222 (See 35 L.D. 399).
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- Hardee, D.C. (7 L.D. 1); overruled so far as in conflict, 29 L.D. 698.
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- Kniskern v. Hastings and Dakota R.R. Co. (6 C.L.O. 50); overruled, 1 L.D. 362.
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- Krigbaum, James T. (12 L.D. 617); overruled, 26 L.D. 448.
- Krushnic, Emil L. (52 L.D. 282, 295); vacated, 53 I.D. 42, 45 (See 280 U.S. 306).
- Lackawanna Placer Claim (36 L.D. 36); overruled, 37 L.D. 715.
- La Follette, Harvey M. (26 L.D. 453); overruled so far as in conflict, 59 I.D. 416, 422.
- Lamb v. Ullery (10 L.D. 528); overruled, 32 L.D. 331.
- Largent, Edward B. *et al.* (13 L.D. 397); overruled so far as in conflict, 42 L.D. 321.
- Larson, Syvert (40 L.D. 69); overruled, 43 L.D. 242.
- Lasselle v. Missouri, Kansas and Texas Ry. Co. (3 C.L.O. 10); overruled, 14 L.D. 278.
- Las Vegas Grant (13 L.D. 646; 15 L.D. 58); revoked, 27 L.D. 683.
- Laughlin, Allen (31 L.D. 256); overruled, 41 L.D. 361.
- Laughlin v. Martin (18 L.D. 112); modified, 21 L.D. 40.
- Law v. State of Utah (29 L.D. 623); overruled, 47 L.D. 359.
- Lemmons, Lawson H. (19 L.D. 37); overruled, 26 L.D. 398.
- Leonard, Sarah (1 L.D. 41); overruled, 16 L.D. 464.
- Lindberg, Anna C. (3 L.D. 95); modified, 4 L.D. 299.
- Lindermann v. Wait (6 L.D. 689); overruled, 13 L.D. 459.
- *Linhart v. Santa Fe Pacific R.R. Co. (36 L.D. 41); overruled, 41 L.D. 284 (See 43 L.D. 536).
- Little Pet Lode (4 L.D. 17); overruled, 25 L.D. 550.
- Lock Lode (6 L.D. 105); overruled so far as in conflict, 26 L.D. 123.
- Lockwood, Francis A. (20 L.D. 361); modified, 21 L.D. 200.
- Lonergran v. Shockley (33 L.D. 238); overruled so far as in conflict, 34 L.D. 314; 36 L.D. 199.
- Louisiana, State of (8 L.D. 126); modified, 9 L.D. 157.
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- Louisiana, State of (47 L.D. 366); overruled so far as in conflict, 51 L.D. 291.
- Louisiana, State of (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.
- Lucy B. Hussey Lode (5 L.D. 93); overruled, 25 L.D. 495.
- Luse, Jeanette L. *et al.* (61 I.D. 103); distinguished by Richfield Oil Corp., 71 I.D. 243.
- Luton, James W. (34 L.D. 468); overruled so far as in conflict, 35 L.D. 102.
- Lyman, Mary O. (24 L.D. 493); overruled so far as in conflict, 43 L.D. 221.
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- Madigan, Thomas (8 L.D. 188) ; overruled, 27 L.D. 448.
- Maginnis, Charles P. (31 L.D. 222) ; overruled, 35 L.D. 399.
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- Mahoney, Timothy (41 L.D. 129) ; overruled, 42 L.D. 313.
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- Martin v. Patrick (41 L.D. 284) ; overruled, 43 L.D. 536.
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- Masten, E. C. (22 L.D. 337) ; overruled, 25 L.D. 111.
- Mather *et al.* v. Hackley's Heirs (15 L.D. 487) ; vacated, 19 L.D. 48.
- Maughan, George W. (1 L.D. 25) ; overruled, 7 L.D. 94.
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- McBride v. Secretary of the Interior (8 C.L.O. 10) ; modified, 52 L.D. 33.
- McCalla v. Acker (29 L.D. 203) ; vacated, 30 L.D. 277.
- McCord, W. E. (23 L.D. 137) ; overruled to extent of any possible inconsistency, 56 I.D. 73.
- McCornick, William S. (41 L.D. 661, 666) ; vacated, 43 L.D. 429.
- *McCraney v. Heirs of Hayes (33 L.D. 21) ; overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- McDonald, Roy (34 L.D. 21) ; overruled, 37 L.D. 285.
- *McDonogh School Fund (11 L.D. 378) ; overruled, 30 L.D. 616 (See 35 L.D. 399).
- McFadden *et al.* v. Mountain View Mining and Milling Co. (26 L.D. 530) ; vacated, 27 L.D. 358.
- McGee, Edward D. (17 L.D. 285) ; overruled, 29 L.D. 166.
- McGrann, Owen (5 L.D. 10) ; overruled, 24 L.D. 502.
- McGregor, Carl (37 L.D. 693) ; overruled, 38 L.D. 148.
- McHarry v. Stewart (9 L.D. 344) ; criticized and distinguished, 56 I.D. 340.
- McKernan v. Bailey (16 L.D. 368) ; overruled, 17 L.D. 494.
- *McKittrick Oil Co. v. Southern Pacific R.R. Co. (37 L.D. 243) ; overruled so far as in conflict, 40 L.D. 528 (See 42 L.D. 317).
- McMicken, Herbert *et al.* (10 L.D. 97; 11 L.D. 96) ; distinguished, 58 I.D. 257, 260.
- McNamara *et al.* v. State of California (17 L.D. 296) ; overruled, 22 L.D. 666.
- McPeck v. Sullivan *et al.* (25 L.D. 281) ; overruled, 36 L.D. 26.
- *Mee v. Hughart *et al.* (23 L.D. 455) ; vacated, 28 L.D. 209. In effect reinstated, 44 L.D. 414, 487, 46 L.D. 434; 48 L.D. 195, 346, 348; 49 L.D. 660.
- *Meeboer v. Heirs of Schut (35 L.D. 335) ; overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- Mercer v. Buford Townsite (35 L.D. 119) ; overruled, 35 L.D. 649.
- Meyer v. Brown (15 L.D. 307) (See 39 L.D. 162, 225).
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- Mikesell, Henry D., A-24112 (Mar. 11, 1946) ; *rehearing denied* (June 20, 1946), overruled to extent inconsistent, 70 I.D. 149.
- Miller, D. (60 I.D. 161) ; overruled in part, 62 I.D. 210.
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- Miller v. Sebastian (19 L.D. 288) ; overruled, 26 L.D. 448.
- Milner and North Side R.R. Co. (36 L.D. 488) ; overruled, 40 L.D. 187.

- Milton *et al. v. Lamb* (22 L.D. 339); overruled, 25 L.D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L.D. 79); overruled, 29 L.D. 112.
- Miner *v. Mariott et al.* (2 L.D. 709); modified, 28 L.D. 224.
- Minnesota and Ontario Bridge Company (30 L.D. 77); no longer followed, 50 L.D. 359.
- *Mitchell *v. Brown* (3 L.D. 65); overruled, 41 L.D. 396 (See 43 L.D. 520).
- Monitor Lode (18 L.D. 358); overruled, 25 L.D. 495.
- Monster Lode (35 L.D. 493); overruled so far as in conflict, 55 L.D. 348.
- Moore, Charles H. (16 L.D. 204); overruled, 27 L.D. 482.
- Morgan *v. Craig* (10 C.L.O. 234); overruled, 5 L.D. 303.
- Morgan, Henry S. *et al.* (65 I.D. 369), overruled to extent inconsistent, 71 I.D. 22.
- Morgan *v. Rowland* (37 L.D. 90); overruled, 37 L.D. 618.
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- Morrison, Charles S. (36 L.D. 126); modified, 36 L.D. 319.
- Morrow *et al. v. State of Oregon et al.* (32 L.D. 54); modified, 33 L.D. 101.
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- Muller, Ernest (46 L.D. 243); overruled, 48 L.D. 163.
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- Neilsen *v. Central Pacific R.R. Co. et al.* (26 L.D. 252); modified, 30 L.D. 216.
- Newbanks *v. Thompson* (22 L.D. 490); overruled, 29 L.D. 108.
- Newlon, Robert C. (41 L.D. 421); overruled so far as in conflict, 43 L.D. 364.
- New Mexico, State of (46 L.D. 217); overruled, 48 L.D. 98.
- New Mexico, State of (49 L.D. 314); overruled, 54 L.D. 159.
- Newton, Walter (22 L.D. 322); modified, 25 L.D. 188.
- New York Lode and Mill Site (5 L.D. 513); overruled, 27 L.D. 373.
- *Nickel, John R. (9 L.D. 388); overruled, 41 L.D. 129 (See 42 L.D. 313).
- Northern Pacific R.R. Co. (20 L.D. 191); modified, 22 L.D. 224; overruled so far as in conflict, 29 L.D. 550.
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- Northern Pacific Ry. Co. (48 L.D. 573); overruled so far as in conflict, 51 L.D. 196 (See 52 L.D. 58).
- Northern Pacific R.R. Co. *v. Bowman* (7 L.D. 238); modified, 18 L.D. 224.
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- Northern Pacific R.R. Co. *v. Marshall et al.* (17 L.D. 545); overruled, 28 L.D. 174.
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- Northern Pacific R.R. Co. *v. Sherwood* (28 L.D. 126); overruled so far as in conflict, 29 L.D. 550.
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- Olson v. Traver *et al.* (26 L.D. 350, 628); overruled so far as in conflict, 29 L.D. 480; 30 L.D. 382.
- Opinion A.A.G. (35 L.D. 277); vacated, 36 L.D. 342.
- Opinion of Acting Solicitor, June 6, 1941; overruled so far as inconsistent, 60 I.D. 333.
- Opinion of Acting Solicitor, July 30, 1942; overruled so far as in conflict, 58 I.D. 331 (See 59 I.D. 346, 350).
- Opinion of Associate Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433 (1961).
- Opinion of Associate Solicitor, M-36463, 64 I.D. 351 (1957); overruled, 74 I.D. 165 (1967).
- Opinion of Associate Solicitor, M-36512 (July 29, 1958); overruled to extent inconsistent, 70 I.D. 159.
- Opinion of Chief Counsel, July 1, 1914 (43 L.D. 339); explained, 68 I.D. 372.
- Opinion of Solicitor, October 31, 1917 (D-40462); overruled so far as inconsistent, 58 I.D. 85, 92, 96.
- Opinion of Solicitor, February 7, 1919 (D-44083); overruled, November 4, 1921 (M-6397) (See 58 I.D. 158, 160).
- Opinion of Solicitor, August 8, 1933 (M-27499); overruled so far as in conflict, 54 I.D. 402.
- Opinion of Solicitor, 54 I.D. 517 (1934); overruled, M-36410 (Feb. 11, 1957).
- Opinion of Solicitor, June 15, 1934 (54 I.D. 517); overruled in part, February 11, 1957 (M-36410).
- Opinion of Solicitor, May 8, 1940 (57 I.D. 124); overruled in part, 58 I.D. 562, 567.
- Opinion of Solicitor, August 31, 1943 (M-33183); distinguished, 58 I.D. 726, 729.
- Opinion of Solicitor, May 2, 1944 (58 I.D. 680); distinguished, 64 I.D. 141.
- Opinion of Solicitor, Oct. 22, 1947 (M-34999); distinguished, 68 I.D. 433.
- Opinion of Solicitor, March 28, 1949 (M-35093); overruled in part, 64 I.D. 70.
- Opinion of Solicitor, 60 I.D. 436 (1950); will not be followed to the extent that it conflicts with these views, 72 I.D. 92 (1965).
- Opinion of Solicitor, Jan. 19, 1956 (M-36378); overruled to extent inconsistent, 64 I.D. 57.
- Opinion of Solicitor, June 4, 1957 (M-36443); overruled in part, 65 I.D. 316.
- Opinion of Solicitor, July 9, 1957 (M-36442); withdrawn and superseded, 65 I.D. 386, 388.
- Opinion of Solicitor, Oct. 30, 1957, 64 I.D. 393 (M-36429); no longer followed, 67 I.D. 366.
- Opinion of Solicitor, 64 I.D. 351 (1957); overruled, M-36706, 74 I.D. 165 (1967).
- Opinion of Solicitor, July 29, 1958 (M-36512); overruled to extent inconsistent, 70 I.D. 159.
- Opinion of Solicitor, Oct. 27, 1958 (M-36531); overruled, 69 I.D. 110.
- Opinion of Solicitor, July 20, 1959 (M-36531, Supp.); overruled, 69 I.D. 110.
- Opinion of Solicitor, 68 I.D. 433 (1961); distinguished and limited, 72 I.D. 245 (1965).
- Opinions of Solicitor, September 15, 1914, and February 2, 1915; overruled, September 9, 1919 (D-43035, May Caramony) (See 58 I.D. 149, 154-156).
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- Rankin, James D. et al.* (7 L.D. 411); overruled, 35 L.D. 32.
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- Rebel Lode* (12 L.D. 683); overruled, 20 L.D. 204; 48 L.D. 523.
- **Reed v. Buffington* (7 L.D. 154); overruled, 8 L.D. 110 (See 9 L.D. 360).
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- State of California (44 L.D. 118) ; overruled, 48 L.D. 98.
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- State of Colorado (7 L.D. 490) ; overruled, 9 L.D. 408.
- State of Florida (17 L.D. 355) ; reversed, 19 L.D. 76.
- State of Florida (47 L.D. 92, 93) ; overruled so far as in conflict, 51 L.D. 291.
- State of Louisiana (8 L.D. 126) ; modified, 9 L.D. 157.
- State of Louisiana (24 L.D. 231) ; vacated, 26 L.D. 5.
- State of Louisiana (47 L.D. 366) ; overruled so far as in conflict, 51 L.D. 291.

- State of Louisiana (48 L.D. 201); overruled so far as in conflict, 51 L.D. 291.
- State of Nebraska (18 L.D. 124); overruled, 28 L.D. 358.
- State of Nebraska *v. Dorrington* (2 C.L.L. 467); overruled so far as in conflict, 26 L.D. 123.
- State of New Mexico (46 L.D. 217); overruled, 48 L.D. 98.
- State of New Mexico (49 L.D. 314); overruled, 54 L.D. 159.
- State of Utah (45 L.D. 551); overruled, 48 L.D. 98.
- *Stevenson, Heirs of *v. Cunningham* (32 L.D. 650); overruled so far as in conflict, 41 L.D. 119 (See 43 L.D. 196).
- Stewart *et al. v. Rees et al.* (21 L.D. 446); overruled so far as in conflict, 29 L.D. 401.
- Stirling, Lillie E. (39 L.D. 346); overruled, 46 L.D. 110.
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- Strain, A. G. (40 L.D. 108); overruled so far as in conflict, 51 L.D. 51.
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NOTE.—The abbreviations used in this title refer to the following publications :
“B.L.P.” to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and
2; “C.L.L.” to Copp's Public Land Laws edition of 1875, 1 volume; edition of
1882, 2 volumes; edition of 1890, 2 volumes; “C.L.O.” to Copp's Land Owner,
vols. 1-18; “L. and R.” to records of the former Division of Lands and Railroads;
“L.D.” to the Land Decisions of the Department of the Interior, vols. 1-52;
“I.D.” to Decisions of the Department of the Interior, beginning with vol. 53.—
EDITOR.

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DECISIONS OF THE DEPARTMENT OF THE INTERIOR

UNITED STATES

v.

ALBERTA HILL SWALLOW ET AL.

A-30000 (Supp.) *Decided January 6, 1967*

Desert Land Entry: Cultivation and Reclamation

Where in a reasonable farming operation conducted by a farmer owning his own farm, crops would be grown on different areas of the farm in two growing seasons, a desert land entryman may use a two season cropping plan in computing the amount of acreage that can be served by a given amount of water.

Desert Land Entry: Cultivation and Reclamation

It is questionable whether peak moisture requirements should be disregarded in determining the acreage in an entry that can be irrigated from the source of water available.

Desert Land Entry: Cultivation and Reclamation

Where an entryman plans a two season cropping operation in which parts of his entry will lie idle part of each year, he is not entitled to an allowance for fallowing in the absence of proof that fallowing is a normal practice for the type of crop plan that he has.

Desert Land Entry: Cultivation and Reclamation—Desert Land Entry: Distribution System

Final proof must be rejected as to an area of desert land entry which can be irrigated, if at all, only by mobile pumping equipment not on the entry at the expiration of its statutory life.

APPEAL FROM HEARING EXAMINER

Alberta Hill Swallow, William Woods Porter II, Lillian Lowther Porter, and Albert Ransom Swallow have appealed to the Secretary of the Interior from a decision dated February 25, 1966, of a hearing examiner which held that final proof filed by each on his desert land entry should be accepted in part and rejected in part and the entries canceled as to the parts rejected.

The sufficiency of the final proofs had been on appeal before. In a decision dated April 8, 1965, A-30000, the Department considered the appellants' appeal from a decision of the Bureau of Land Manage-

ment rejecting their entries in part and concluded that the evidence presented at a hearing was not sufficient to warrant its resolving the issues presented by the appeal. Accordingly, it set aside the Bureau of Land Management's decision and remanded the case to the Bureau of Land Management for a further hearing. The Bureau of Land Management in turn sent the case to the hearing examiner with instructions that if the parties so stipulated, an appeal from the hearing examiner could be taken directly to the Secretary. The parties consented to this procedure and the appeal is here without having been reviewed by the Director of the Bureau of Land Management.

In its first decision the Department stated that the basic issue was whether "the systems actually installed by the entrymen would have provided enough water for all or part of each entry," that is, the entrymen not only had to have developed sufficient water but also had to have provided the physical means to carry it to every legal subdivision.

To determine the amount of water needed, the Department added, it would be necessary to ascertain what crops could be grown successfully as a mainstay of the land being irrigated if the entrymen were to offer any crop or crops other than alfalfa as the principal one.

In the second decision the hearing examiner found that the pumping plant installed on the Lillian Porter entry serving that entry and two other adjacent entries, referred to as the combined entries,¹ is capable of producing 1,600 g.p.m., that while alfalfa had been the main crop in the area in 1957, other field crops have been gradually gaining in production so that alfalfa is losing its role as the principal crop in the area, and that other field crops such as sudan grass, oats, barley, rye, and wheat, have been successfully grown in the area of the claims. He then concluded that as a matter of law an entryman could produce one crop from a part of his entry in the summer growing season and a second crop from another part of his entry in the winter growing season and that climatic conditions in southern California permit the harvesting of two crops per year. He found, however, that the sprinkler lines on the combined entries could irrigate only 200 acres on an 11-day cycle necessary to successfully irrigate the land. Allowing for two crops per year, he found that successful crops could be produced from 400 acres of the combined entries. Accordingly, he rejected the final proof as to 160 acres in each of the three combined entries.

Turning to the other entry² he found that equipment on the entry

¹ The three entries comprise the following: Lillian Lowther Porter, N½ sec. 2; Albert Ransom Swallow, S½ sec. 2; William Woods Porter II, E½ sec. 3; all in T. 11 N., R. 4 W., S.B.M., California.

² The Alberta Hill Swallow entry covers the S½ sec. 4, T. 11 N., R. 4 W., S.B.M., California.

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could successfully reclaim the SE $\frac{1}{4}$ of section 4, and he held the final proof for rejection as to the SW $\frac{1}{4}$ sec. 4.

The appellants quickly filed a petition asking for reconsideration mainly upon the grounds that it was erroneous to allocate equal amounts of irrigable acreage to the summer and winter growing seasons, and that the same amount of water could be delivered to four times as much land in winter as in summer, so that if 200 acres can be irrigated in summer, 800 can be irrigated in winter.

In reply, the contestant argued that even if there are two growing seasons, they overlap to such an extent that water would be required for both crops during a 2 $\frac{1}{2}$ -month period, that for a time both crops would require water in the same amount, and that the contestees had not shown that there was water sufficient for both crops during the overlap of growing seasons.

The contestees answered that the crucial issue would be whether there was conflict in *irrigation* seasons rather than *growing* seasons, that there was none and that there was ample water to irrigate 4 times as much of the entries in winter as in summer.

In a supplemental decision dated July 5, 1966, the hearing examiner denied the petition, holding that winter irrigation required an 11-day cycle, that in 11 days 200 acres could be irrigated, that summer irrigation requires a 7-day cycle, so that in summer the water distribution system could irrigate only 125 acres, and that the allowance of 480 acres for the three combined entries was reasonable.

He also held that the irrigation equipment on the separate entry (Alberta Swallow) could service only $\frac{1}{3}$ as much as that on the combined entries and that 160 acres was allowed for the planting of two crops per year.

The contestees promptly filed a second petition for reconsideration in which they have asserted that the program of applying 5 inches of water every 11 days is a summer peak program and not a winter one, that 200 acres can be irrigated in the summer and 800 in the winter, and that water has been and can be delivered to every 40 acre subdivision of the separate entry.

On July 20, 1966, the hearing examiner again denied reconsideration, holding in general that all matters raised had been considered previously and in particular that mobile irrigation units not on the Alberta Swallow entry could not be offered as a method for internal distribution of water on that entry.

The contestees then filed this appeal to the Secretary. They allege as error the use of a 5 inch—11 day cycle for winter irrigation, the finding that summer irrigation requires a 5 inch 7 day irrigation cycle, and the refusal to find that water has been brought to every 40 acre subdivision of the separate entry. They assert that four times as much land can be irrigated in the winter as in the summer, and that each

subdivision of the separate entry can be irrigated. Further, they contend, the Government's case was based upon water necessary to produce optimum crops during the short summer season, that the 9 g.p.m. figure used by the Government finds no support in the practices of operating farms, that plants will mature on less than peak water needs and that if water costs more than \$5 per acre foot it is uneconomical to meet peak water needs, that the hearing examiner based his calculations on too low an estimate of irrigation efficiency, that 88 percent, not 75 percent, is the correct figure.

In reply the contestant says that the contestees' arguments are based on the assumption that the two crop seasons are completely separate but that their crop plans do not show the peak moisture requirements or the growing seasons of the proposed crops so that the mere citation of gross water supply is meaningless, that the hearing examiner based his conclusion on the acreage that the equipment on the entries could service and that 75 percent is not too low a measure of irrigation efficiency.

As stated in the Department's decision of April 8, 1965, the basic issue in the case is how many acres of the entries can be adequately irrigated with water from the wells, pumping plants, and distribution systems installed by the contestees within the life of the entries.

In determining this issue, we consider first the hearing examiner's conclusion that it is within the law for any entryman to harvest a crop from one portion of his entry in the summer season and from another in the winter by utilizing twice a year a water supply adequate for only one season and one portion of the entry. Despite three-quarters of a century of intensive consideration of desert land entries, the question does not appear to have been ruled upon one way or another.

The statute is not too helpful. The only pertinent provision requires that the entryman file a plan "showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops." Section 4, act of March 3, 1877, as added by sec. 2 of act of March 3, 1891, 26 Stat. 1096; 43 U.S.C. sec. 327 (1964).

In our earlier decision, we said, in speaking of the types of crops to be used in computing the acreage that could be serviced by the amount of water the entryman had developed, "The test is not whether certain crops can be produced on the land in question but whether those crops can be produced successfully in a normal reasonable agricultural production."

The principle underlying that criterion is equally applicable to deciding the multiple seasons of growth issue. We must ask, "How does the ordinary reasonable farmer acting solely upon agricultural considerations conduct his farming operations?" We must assume that the desert land law seeks to stimulate the reclamation of otherwise unproductive lands into ordinary economically feasible agricul-

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tural units. In other words, is the plan proposed by the entryman the one he would follow if he already owned the land and were seeking only the best return possible on his labor and expenditures? While, of course, there may not be unanimity among farmers similarly situated as to the best farming policy, we must assume uniformity of motive—that is, economic gain.

If an entryman offers a farming plan composed of crops or growing seasons different from those of other like enterprises, he must be prepared to demonstrate its economic feasibility. He has, of course, four years to develop his entry and to show the practicability of his proposal. If at final proof he can show that he has operated under an economically remunerative plan, then, although he may have been an innovator, he has evidence of the practicability of his method.

If, however, he comes to final proof with only a theory to support his plans, and can offer neither his own experience nor that of other farmers in support, then he has a more difficult task. As we said in our earlier decision:

The determination of what acreage is irrigable from the systems installed by the appellants is not to be made with reference to an unorthodox or speculative crop plan or lack of plan which is completely out of step with prevailing or existing agricultural practices in the area.

The hearing examiner did not advert to this standard. He said he found no superlatives in the law such as “‘mainstay of the land,’ ‘principal crops in the area,’ ‘optimum crops,’ or ‘economically favorable crops.’” He insisted that the contestant was restricting the entrymen to crop plans based on alfalfa, which is commonly grown in the area and which would produce the greatest profit per acre, and held such a limitation had no foundation in law. The proper criterion, he held, was whether the crop produced was profitable, considering the climate, the character of the land and the kinds of crops being grown.

We agree with the criterion stated by the examiner. However, we disagree if he intended to imply that, in evaluating an entryman's crop plan, it is improper to consider what crops are the mainstay of the typical farm in the area, what are the principal crops, the economically feasible crops. Experience and practice are highly significant. If 95 percent of the farmers in an area raise nothing but alfalfa, there must be some sound basis for doing so. If an entryman in the area proposes to raise some other crops, it does not mean that he will fail—witness the 5 percent of the farmers who do not raise alfalfa—but he certainly bears a heavy burden of establishing that his proposed crop plan is feasible. The question here is whether the contestees' proposal of growing alfalfa on $\frac{1}{5}$ of the entries in the summer and winter grains on $\frac{4}{5}$ of the entries in the winter is a feasible crop plan.

A witness for the contestant, Harlan D. McIntire, soil conservationist with the U.S. Department of Agriculture, testified that a plan of this nature would not be a typical agricultural operation (Tr. 278). He testified that alfalfa is the principal crop grown in the area of the entries and that the nearest farm had 1,000 acres in that crop and 80 acres in sudan grass and oats (Tr. 275, 285). He questioned whether grain is an economically feasible crop in the area (Tr. 279).

That alfalfa is by far the predominant crop grown in the area is established by numerous bulletins and reports introduced in evidence not only by the contestant but even more by the contestees (Contestant's Exhibits 17, 20; Contestees' Exhibits J, L (p. 19), N, O). In fact, one of contestees' exhibits, a bulletin of the University of California Agricultural Extension Service, states that production of irrigated small grains in San Bernardino County, where the entries are located, is limited almost entirely to the high desert because small grains are a very low income crop, and that the acreage in the high desert "is almost limited to that grown in rotation with alfalfa or desert land entry land development" (Exhibit K).

The exhibits, however, do list many crops other than alfalfa that can be grown in high desert areas, and appellant William Porter stated that winter crops can be grown in the area and that summer and winter crops are common in the area (Tr. 502). The contestant did not present evidence that crops other than alfalfa could not be grown with success, nor has it disputed this in its arguments on appeal.

The cropping schemes proposed by the contestees thus may be technically sound. That, however, is not enough. There must also be plans that the reasonably prudent farmer would follow on lands that he owned, for otherwise the purpose of the desert land law, the reclamation of arid lands, would not be accomplished.

Of all the land in the four entries only 40 acres in each have been reclaimed through irrigation and cultivation. The remaining land is just as it was before entry. If the contestees are issued patents for all of their respective entries, they will, of course, own them in fee. As fee owners, then, they will undertake further development only in accordance with the same economic rules that govern the conduct of all reasonably prudent farmers. They will only grow crops which yield an economic return and will open up only that land which can be most profitably exploited.

After patent, an entryman assuredly would not devise a cropping plan based upon a combination of water available and crop water requirements calculated principally simply to permit the cultivation of the maximum acreage at his disposal. Therefore, if an entryman were to receive a patent for land he has not reclaimed before

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patent which he would not as a reasonable farmer reclaim after patent, in all likelihood such land would not be reclaimed. If this were to occur, the purpose of the desert land law would be flouted by the very act intended to reward compliance with the terms of the statute.

Appellant William Porter offered no probative evidence to support the economic soundness of contestees' cropping plans. On cross-examination he could not identify any farm in the area where irrigated grain was the mainstay of the operation or its predominant crop (Tr. 500-551), nor did he cite any farming operations based primarily upon winter production. His only evidence was that there has been significant production of grains and crops other than alfalfa in the general or adjoining area. However, the evidence does not show how this production relates to the much more predominant alfalfa production, that is, whether the grains, etc. were grown in rotation with alfalfa, supplemental to alfalfa, or as principal crops.

On the other hand, the contestant offered no evidence to contradict the contestees' evidence that winter crops could be grown in the area, and, indeed, has not disputed this assertion in its discussion of the contestees' appeal.

We are constrained, then, to conclude, on the basis of the record in this case, that a farming operation consisting of alfalfa in the summer backed up by a winter crop of cereals or other comparatively low water duty crops could be a reasonable farming operation.

This leads us to the principal issue as to how much of the entries could be adequately irrigated upon the basis of a two cropping season operation.

The examiner found in his decision of February 25, 1966, that 200 acres of the combined entries could be irrigated each season, making a total of 400 acres for a year. He based his finding upon several factors, including a peak water requirement of 0.30 inch per acre per day, a moisture infiltration rate of 0.5 inch per hour, and an irrigation efficiency of 75 percent. He then determined that the irrigation equipment on the combined entries, consisting of six 1,320-foot lateral sprinkler lines spaced at 50-foot intervals, could irrigate 200 acres in an 11-day cycle, from which he concluded that on a two crop per year basis 400 acres could be successfully irrigated to produce a profitable crop. He did not give his calculations in detail.

When the contestees pointed out that if the water and irrigation equipment could irrigate 200 acres in the summer, it could support much more, four times they say, in the winter growing season producing crops requiring much less water, the hearing examiner replied in his supplemental decision of July 5, 1966, that the 200 acres was in fact the winter limit and that the summer limit, on a 7-day irrigation cycle, was 125 acres.

In this decision, the examiner gave his calculations in detail. They were as follows: The lateral lines will cover 396,000 square feet per setting (9.1 acres). The maximum application (infiltration) rate is 0.5 inch per hour. If 5 inches are applied at each irrigation at the rate of 0.45 inch per hour, the time required will be 11.1 hours per setting. At two settings per day 18.2 acres can be irrigated with 5 inches of water. On an 11-day cycle a total of 200.2 acres can be irrigated with the well producing 1,600 g.p.m. The 11-day cycle is for winter crops. Summer crops require a 7-day cycle, which means that 125 acres can be irrigated with two settings per day.

For the Alberta Swallow entry, he determined that two lateral lines could be constructed from the equipment stored on the entry and that therefore one-third of 200 acres, or 66 acres, could be irrigated on the basis of the same criteria as those used for the combined entries.

We are unable to accept the examiner's calculations. They appear to be based on a number of assumptions which we believe to be unsupportable and to overlook some essential factors. In our previous decision, we emphasized that the critical issue was how many acres in each entry could be supplied with the required amount of water through the well, pumping plant, and distribution system installed by the contestees. This requires a determination of how much water must be applied *from the sprinkler head* in order to raise a successful crop. This in turn entails a determination as to the *net* amount of water required by the plant and the *gross* amount that must be supplied to achieve the net, taking into consideration evaporation loss and seepage loss. Then it must be determined how much water can be produced at the well head *with the pumping plant installed by the entryman*. This is not necessarily the capacity of the well, for the pump installed may be undersized or otherwise insufficient to utilize the full capacity of the well. Determining the pumping rate at the well head, however, is not the end, for the water must travel through the distribution system to reach the sprinkler outlets. This entails a friction loss which reduces the amount that can actually be delivered by the sprinklers. There are therefore two losses that must be subtracted from the volume of water that can be pumped into the open air at the well head: the system loss (friction loss) and the irrigation loss (evaporation and seepage). The losses may be stated in terms of efficiency, say, system efficiency (friction loss) and irrigation efficiency (evaporation loss).

Starting at the pump on the combined entries we note that the examiner accepted appellant William Porter's calculation that the pump could deliver 1,600 g.p.m. at the well with a 160-foot lift (Tr. 526, 529). Contestant's witness, Crawford Reid, calculated a rate of 1,450 g.p.m. with a 190-foot lift (Tr. 574). However, although the examiner, in his decision of February 25, 1966, accepted an irrigation efficiency of 75 percent, his calculations in his supplemental decision show

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that he took 1,600 g.p.m. as the rate of water that could be applied to the crop.³ He referred to frictional losses in the mainline and laterals but did not take them into consideration in his calculations. This is demonstrated by the fact that 1,600 g.p.m. will produce approximately 85 acre-inches per day (Exhibit 10) whereas the examiner calculated that 18.2 acres could be supplied with 5 inches of water per day, a total of 91 acre inches. To produce 91 acre inches without any friction loss would require a pump output of over 1,700 g.p.m. 1,600 g.p.m. delivered at an efficiency factor of 75 percent would produce only 64 acre-inches per day or enough to cover approximately 13 acres with 5 inches of water. Because the examiner did not include a frictional loss factor in his computations and because, in any event, his determination of 18.2 acres per day requires more water than can be supplied even at the full rate of 1,600 g.p.m., the basis for his finding that 200 acres can be irrigated on an 11-day cycle fails.

What then is the acreage that can be irrigated on the combined entries? The contestees insist that any computation should not be on the basis of a peak moisture requirement but simply on the basis of a total season's requirement. Accepting that basis and the seasonal requirement of 6 acre feet for alfalfa and 1.6 acre-feet for winter grains (Exhibits V and X) and an efficiency factor of 75 percent,⁴ we find that 1,600 g.p.m. will produce 968 acre feet per 6-month season. This is sufficient to irrigate 161 acres of alfalfa or 605 acres of winter grains, or a total of 766 acres for a two crop season year.

If the acreage is to be calculated on the basis of peak moisture requirements, we have the testimony of McIntire that the pumping rate of 1,026 g.p.m., computed by Government witness Robert David Gibbons for the well on the combined entries, would irrigate 108 acres during the peak use month of July (Tr. 291-310). On this basis 1,600 g.p.m. at an efficiency factor of 75 percent, or 1,200 g.p.m., would irrigate 126 acres of alfalfa. This is 35 acres less than the amount computed without regard to peak moisture requirements.

There was no testimony or evidence as to any peak moisture requirements for winter grain. Consequently, the total acreage for a two crop season year would be 731 acres (126 plus 605).

In view of the relatively small difference in the total acreage figures, we deem it unnecessary to decide whether peak moisture requirements should be disregarded as appellants contend. However, we note

³ In the supplemental decision, the examiner apparently used an efficiency factor of 75 percent in calculating that each sprinkler head could produce 6.28 g.p.m., thus indicating that there is a 25 percent loss in the system.

⁴ As we have noted, contestees contended that the irrigation efficiency should be 88 percent, not 75 percent. However, they rely on a statement in the *Sprinkler Irrigation Handbook*, p. 19, an unnumbered exhibit which clearly refers only to evaporation losses. In computing the pump output to be 1,600 g.p.m., appellant William Porter specifically recognized friction losses or losses due to back pressure in pipe line system (Tr. 525). Assuming a total loss of only 25 percent is therefore conservative.

that section 4 of the Desert Land Act, *supra*, requires an entryman to submit an irrigation plan which "shall be sufficient to *thoroughly* irrigate and reclaim" the land (*italics added*). The notion of "coasting" through a peak moisture period without supplying the water needed for normal growth at that time does not seem to be consonant with that statutory directive.

The total acreage figures that we have calculated (731 or 766 acres) are valid only if there is no overlap between the irrigation seasons for alfalfa and winter grains. The only remaining issue, then, as to the combined entries is whether there is such an overlap in irrigation requirements that it would reduce the acreage that can be serviced by the water and equipment available during the life of the entries. The contestant alleges that there will be a 2½ month overlap in growing seasons, while the contestees assert that there is sufficient flexibility in the planting schedules to minimize or avoid overlap and that even if there is some overlap in irrigating for optimum yield, some irrigation can be omitted without serious results. We note that Contestant's Exhibit 19 states that "On the High Desert, cereals should be seeded from September 15 to November 1." There would be little, if any, overlap between an alfalfa growing season that ended on November 10 (Tr. 290) and a cereal planting of November 1 so far as irrigation is concerned.

We conclude, therefore, that the water supply available from the distribution system on the combined entries is adequate to irrigate from 731 to 766 acres. Allowance of the combined entries to the extent of 800 acres is therefore warranted. This includes an allowance of 34 to 69 acres for facilities, such as roads, storage areas, etc., and averages out to 51½ acres, which is close to the 60 acres that contestees would contend that they are entitled to on a 7½ percent basis.

The acreage allowed includes nothing for fallowing. The contestees have asserted that they are entitled to 14.5 percent for fallowing. We agree with the examiner that since portions of the entries under a two-crop season operation will be idle part of each year, no fallowing allowance should be given. McIntire testified that fallowing has no place in an irrigated crop system although land is sometimes left uncropped for one reason or another (Tr. 288). The contestees offered no real proof that fallowing is a normal practice for the type of operation they propose. All they have submitted is a tabulation showing land use in an adjoining area which lists an acreage of land as "Fallow Irrigated Lands" (Exhibit L, p. 27). Without more, this mere listing of fallow acreage in an extensive area where many crops are grown scarcely supports contestees' assertion that they are entitled to a fallowing allowance. Other evidence referred to by them is inapplicable or in the most general terms (Tr. 511-519). For example, Exhibit U discusses fallowing for *non-irrigated* crops.

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Turning now to the single entry (Alberta Swallow) we note that the only dispute is whether the SW $\frac{1}{4}$ of section 4 could have been irrigated successfully with portable equipment and ditches on the entry on the date the statutory life of entry terminated.⁵ The hearing examiner found that the equipment and ditch could reclaim only the SE $\frac{1}{4}$. The contestees point to the ditch running through the SW $\frac{1}{4}$ just about at the center line and to the photographs of the ditch full of water. They add that the land slopes to the south so that there would be no difficulty in irrigating land south of the ditch and that land to the north could be irrigated by means of some portable pumping device. They did not have such a pump on the entry.

From our review of the record we have concluded that while the ditch extending from the end of the pipe line into the SW $\frac{1}{4}$ is minimal in construction the evidence shows it did serve to carry water in adequate amounts so that the S $\frac{1}{2}$ SW $\frac{1}{4}$ could be irrigated. There is nothing, however, to indicate that there was any means of irrigating the N $\frac{1}{2}$ SW $\frac{1}{4}$. The possible acquisition of pumping equipment is not sufficient; the equipment must be on hand. Thus, the final proof filed for the single entry must be rejected as the N $\frac{1}{2}$ SW $\frac{1}{4}$ sec. 4.

With respect to the combined entries the final proof will be accepted as to all but the E $\frac{1}{2}$ E $\frac{1}{2}$ sec. 2.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision of the hearing examiner is affirmed in part and reversed in part as set forth in this decision and the case is remanded for further action on the final proofs in accordance with this decision.

ERNEST F. HOM,
Assistant Solicitor.

MONTE L. LYONS

A-30648

Decided January 10, 1967

Alaska: Trade and Manufacturing Sites

The use of a site for the purpose of growing in greenhouses and hothouses and selling shrubs, small trees, vegetables and other plants contemplates only a horticultural or agricultural pursuit which is not considered as a trade, manufacture, or other productive industry within the meaning of section 10 of the act of May 14, 1898, authorizing the purchase of land possessed and used for such purposes.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Monte L. Lyons has appealed to the Secretary of the Interior from a decision of the Chief, Office of Appeals and Hearings, Bureau of

⁵ The water supply on that entry is sufficient to irrigate the entry on the basis of the calculations made for the combined entries.

Land Management, dated April 29, 1966, which declared his notice of location of a trade and manufacturing site to be null and void. The decision affirmed a decision by the Anchorage district and land office, dated February 17, 1966, which held that the notice was not acceptable for recordation, but modified the district and land office decision by finding it unnecessary to determine whether the reason given in that decision was correct, namely, that the land applied for had been segregated from all applications and appropriations under the public land laws by reason of selection application Anchorage 058566 filed by the State of Alaska on January 8, 1963.

The appellant's notice of location was filed August 2, 1965, and stated that occupancy or settlement was made on June 12, 1965. He listed improvements as being "staking, flagging and partial clearing." In Item 9 of the notice form (No. 4-1154, September 1963) as to the kind of trade, manufacturing or other industry for which the claim is maintained or desired he stated: "planting, cultivating and selling shrubs and trees. (Tree Nursery)." The Office of Appeals and Hearings considered this statement as indicating a horticultural use of the land, and concluded that such a use was not permitted as a "trade or manufacturing site."

The appellant's notice was filed under section 10 of the act of May 14, 1898, 30 Stat. 413, as amended, 48 U.S.C. sec. 461 (1958), which permits the purchase of not more than 80 acres by one:

* * * in the possession of and occupying public lands in Alaska in good faith for the purposes of trade, manufacture, or other productive industry * * *.

The appellant does not deny that lands which are used directly for agricultural or horticultural purposes are not subject to purchase under this act. However, he states that he is not going to use the soil of the site for agricultural or horticultural purposes. He asserts that the land is 1000 feet in elevation, which approaches the timber line, and that in fact one-half of the tract is above the timber line making it very impractical if not impossible to use the land for horticulture or agriculture. He states that his intent was to utilize the site:

For location only as a place to construct greenhouses to cultivate and grow shrubs, small trees and various other plants.

In addition, I had planned on building hot-houses for the purpose of growing and selling vegetables [sic] on a year round basis. This type of operation has been tried and proven a success in the Soldotna, Alaska area.

* * * In my case I am utilizing the site for location only to construct buildings in which to carry out a trade. I will in no way use the soil of the land for the purpose of agriculture. I feel that this type of business is no different nor should be segregated from any other type of business or trade that can be conducted within the confines of the required structures.

The question presented by appellant's appeal is whether the growing of shrubs, small trees, vegetables and other plants in greenhouses or hot-houses constructed on the site may be considered as a "trade, manufacture, or other productive industry" within the meaning of section

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10 of the act of May 14, 1898. Appellant appears to admit that direct usage of the soil of the land for raising crops would not come within the meaning of the act. The case cited in the decision below, *Charles G. Forks et al.*, A-29108 (October 8, 1962), supports that conclusion. In that case, although an applicant planned to locate a commercial seed cleaning plant on the tract, he also planned to use the tract for the purpose of cultivating and producing grass and grass, grain and legume seeds. It was held that the land could not be located for agricultural purposes under section 10 of the 1898 act. The decision of the Office of Appeals and Hearings also cited *John G. Brady*, 26 L.D. 305 (1898), for the proposition that Congress did not intend to authorize a trader or manufacturer in Alaska to acquire, as incident to his business, any land for the growing of hay or fruit trees.

Appellant would distinguish these cases from his because in those cases the land was to be utilized directly for the purpose of agriculture, whereas in his case cultivation of plants, shrubs and trees would be inside the structures he is to build.

The *Brady* case, *supra*, was a ruling under an earlier act, section 12 of the act of March 3, 1891, 26 Stat. 1095, which permitted the purchase of lands for the purpose of "trade or manufactures." In interpreting those words the case held that the raising of any agricultural crops, the growing of fruit, or other horticultural and agricultural pursuits were not within the meaning of that phrase. In another case under the 1891 act, the meaning of the word "trade" was discussed and it was concluded that it was used in a commercial sense as opposed to a vocational or occupational sense, thus that the following dictionary definition quoted therein would be applicable:

"The act or business of exchanging commodities by barter, or by buying and selling for money; commerce; traffic; barter;" *Alfred Packenmen*, 26 L.D. 232, 235 (1898). X

The *Packenmen* case, *supra*, concluded that, considering the history of legislation applicable to Alaska and the situation existing there when the 1891 act was enacted, it was not the purpose of Congress to authorize the purchase of land used for farming.

These cases under the 1891 act are relevant in considering the meaning of the terms "trade and manufacture" in relation to section 10 of the 1898 act, which was substantially a reenactment of section 12 of the earlier act. However, the 1898 act added the phrase "or other productive industry." This phrase broadened the scope of the act to include some activities which were not considered covered under "trade and manufacture." Thus, in the *Packenmen* case, *supra*, fox farming was held not to be a "trade and manufacture" under the 1891 act. But it was held to constitute a "productive industry" within the meaning of the 1898 act. *Yukon Fur Farms, Inc.*, 56 L.D. 215, 217 (1937). The decision discussed the legislative history of the 1898 act with respect to the term "productive industry" and concluded: X

* * * The fact that attention was called to the very broad meaning of the words "productive industry," which was not disputed, and that the words were retained in the bill without limitation or qualification tends to support the view that the legislative intent was not to confine their operation to canning fish [the subject specifically discussed] or any particular form of productive industry* * *

Although Congress was primarily concerned with the situation of fish canneries, both in regard to the 1891 act and the 1898 act, it is clear that it did not intend to limit the type of "trade, manufacture, or other productive industry," to that relating to the fish canning business.

I. The question presented here is whether the use of land for propagation and growing of plants in greenhouses and hothouses falls within the category of purposes authorized under section 10 of the 1898 act. Clearly it is not "manufacturing," which involves the making of some product from raw materials. The term "industry" is broader in scope than manufacturing and has several meanings. However, it is apparent that the word was meant in the same business and commercial sense as "trade" and "manufacture" are, as the act speaks of "trade, manufacture, or *other* productive industry" (*italics added*). Some common meanings of the word "industry" used in this sense are as follows: In *Webster's Collegiate Dictionary* (5th ed. 1945), the third meaning is:

Any department or branch of art, occupation or business; esp., one which employs much labor and capital and is a distinct branch of trade; as the sugar *industry*.

In *Webster's New World Dictionary of the American Language* (College ed. 1960), two pertinent definitions are:

4. Any branch of trade, business, production, or manufacture: as, the paper *industry*, the motion-picture *industry*.

5. (a) manufacturing productive enterprises as distinguished from agriculture.

This last definition is significant because, in considering the background of the 1891 and 1898 acts, it is apparent that Congress has made a clear distinction between the agricultural use of land and the use of land for trade, manufacturing, and other industrial, business and commercial purposes. Although a few cases, which may be attributable to the exceptional situation and legislation out of which they arose, may have included the raising and propagation of plants and trees within one of these three categories, generally the raising and propagation of plants, trees, etc., though for purposes of sale, has not been considered a trade, manufacturing or industrial pursuit. See, *e.g.*, cases listed in *Words and Phrases* under those headings. There is a point when products achieved through agricultural and horticultural processes are considered as being within industry. Thus, for example, in one case the court held that it was:

When agricultural or horticultural products leave the farmer or grower, as such, and are brought to an independent factory or packing house for processing, grading, packing, and marketing. * * * *In re Yakima Fruit Growers Ass'n.*, 146 P. 2d 800, 804 (Wash. 1944).

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Also, clearly if there is some man-made change in the agricultural product, such as the refining of raw sugar cane or sugar beets to produce sugar, then the agricultural stage has passed on to the industrial stage.

The use, however, which appellant proposes does not contemplate any changing of a raw agricultural product to some other form, but merely contemplates the propagation and growing of the raw product in greenhouses and hothouses. The fact that appellant is not going to use the soil of the land for any horticultural or agricultural purpose does not change the purpose for which he proposes to occupy the land, that is, to propagate and grow vegetative crops. This is clearly horticulture or agriculture. The mere fact that he will sell what he grows does not mean that he will be conducting a trade or productive industry on the site. Obviously farmers, horticulturists, and nurserymen also sell their products. It is conceivable that the use of a greenhouse and hothouse may take on aspects of a trade, if there are extensive business and commercial operations conducted within them or in connection with them, for example, if the major purpose of the building is to act as a storehouse for products bought from others and then resold generally, or if the products are otherwise brought there to be processed in some manner. However, merely to raise the vegetables, trees and shrubs and other plants in a greenhouse, contemplating their sale, appears to be more of an agricultural or horticultural endeavor than a trade or a productive industry, in the sense that these terms have generally been considered in administering the public land laws. The fact that this work is proposed to be done within a building does not of itself change the basic purpose and functional use of the site. Accordingly, we conclude that appellant's proposed use of the tract would not constitute trade, manufacture or other productive industry within the meaning of the 1898 act.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a) ; 24 F.R. 1348), the decision of the Office of Appeals and Hearings, Bureau of Land Management, is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

APPEALS OF AMERICAN CEMENT CORPORATION

IBCA-496-5-65

IBCA-578-7-66

Decided January 10, 1967

Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Hearings—Rules of Practice: Appeals: Dismissal

An appellant's motion for reconsideration of a decision in which a hearing was scheduled for the purpose of establishing whether the board had jurisdiction

over a claim for unnecessary acceleration of construction costs is denied where it is found that a crucial allegation made by appellant is contradicted by information furnished to the contracting officer in support of the claim and that the evidence to be developed at a hearing may resolve the apparent contradiction and the jurisdictional questions presented.

Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal—Rules of Practice: Hearings

A government motion for reconsideration of a decision dismissing a contractor's claim for loss of commercial business as sounding in breach of contract is denied where the Government alleges that the claim could have been stated in such terms as to be cognizable as a claim arising under the contract but the claim as actually submitted is clearly not, in fact, cognizable thereunder, and the Government fails to show that there are material facts in dispute which could confer jurisdiction or that scheduling a hearing would otherwise serve any useful purpose.

BOARD OF CONTRACT APPEALS

The appellant and the Government have filed timely motions for reconsideration of our interlocutory decision of September 21, 1966, insofar as it pertains to IBCA-578-7-66. The appellant has requested reconsideration of our decision respecting Claim No. 4 (Unnecessary Accelerated Construction Costs), while the Government has requested reconsideration of our decision in reference to Claim No. 5 (Loss of Commercial Business). Neither party has requested reconsideration of the portion of the decision in which we found that the issues presented by Claim No. 3 (Barrels of Cement in Excess of 3,000,000)¹ were clearly within our jurisdiction.

Claim No. 4 (The Acceleration Claim)

In the interlocutory decision we found that, from the record before us, we were unable to say whether the Board had jurisdiction over the appellant's Accelerated Construction Costs claim and that primarily we needed to know more facts in order to answer the jurisdictional question presented. So finding, we denied the appellant's request for a summary determination that the contracting officer and the Board did not have jurisdiction over Claim No. 4, without prejudice to the appellant's right to renew the motion after a hearing on the claim.

Appellant's counsel contests the propriety of the aforementioned findings on the basis that confusion as to the claim seems to have arisen through a misunderstanding of the facts. The Board's attention is called to the fact that "Contractor has consistently maintained throughout its pleadings before the contracting officer, the Board, and the U. S. Board of Claims [sic] that the Contractor from the outset 'programmed the construction of the Clarkdale cement facilities on an accelerated basis in order to be in a position to fill Governmental

¹ Docketed as IBCA-496-5-65.

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orders under the Contract beginning August 1, 1959.' * * *² Summarizing its position appellant's counsel categorically asserts:

* * * Simply stated, it was part of the initial agreement between the Government and the Contractor that Contractor would build cement facilities at Clarkdale in a manner so as to be able to meet the August 1, 1959 delivery date. Nothing ever took place after the initial agreement which accelerated plant construction. (Memorandum of November 1, 1966, p. 3)

We find, however, that the present state of the record precludes us from accepting appellant's assertions at face value. If, as appears to be the case, the contract itself is the initial agreement to which the appellant refers, and if thereafter nothing took place which accelerated plant construction, the information furnished by the appellant in support of its claim seems to be irreconcilable with the position taken.

The contract was awarded to the appellant under date of April 3, 1958. On June 9, 1958, the Fisher Contracting Co., was awarded a contract to construct a 1.8 million barrel cement plant for the appellant in Clarkdale, Arizona.³ According to the detailed information which accompanied the appellant's letter of January 10, 1966, the construction of the plant was originally scheduled for completion in December 1959, i.e., at least four months later than the Government could have required delivery of cement under the terms of the contract.⁴

Of less significance to the question of our jurisdiction but nonetheless illustrative of the state of the record respecting related factual questions is the appellant's assertion that it could have completed the Clarkdale plant prior to August 1, 1959, if it had not been for the strike at the dam site during the early summer of 1959, which caused it to decrease the rate of construction of the plant.⁵ This statement not only fails to take note of the observations made by the contracting

² A similar position is advanced in the Memorandum of December 2, 1966, where on page 1 appellant's counsel states: "1. By Contract No. 14-06-D-2838, the Contractor was required to begin making deliveries of cement on and after August 1, 1959, in the amount of 150,000 barrels for that calendar year. In order to comply with this contract provision and the overall cement requirements of the contract, Contractor began the construction of a cement facility at Clarkdale, Arizona. This construction was undertaken at a stepped-up rate, paying premium prices for materials, labor, et cetera, so that Contractor could meet its contract obligations."

³ Findings of Fact of May 18, 1966, Exhibit 4, page 12. This exhibit and most of the exhibits to the findings represent contractor furnished documents.

⁴ By its letter of December 16, 1965, to American Cement Corporation (Findings, Exhibit 4, page 13), the Fisher Contracting Co., forwarded a schedule of excess costs of constructing the Clarkdale plant because of the accelerated construction schedule and in connection therewith stated: "As you will recall the project was originally scheduled for December 1959 completion. Later the project time was shortened to be completed in August * * *"

⁵ In the memorandum of November 1, 1966, the appellant's counsel states at page 2: "Contractor has also consistently maintained that although Contractor could have completed its Clarkdale plant construction on the accelerated program previously mentioned prior to August 1, 1959, when it was advised of the strike [at the dam site] during early summer of 1959, it decreased the rate of construction of the plant so that the plant was ultimately completed and in operation in October 1959 * * *"

officer in the findings from which the appeal was taken⁶ but also ignores what is clearly conceded by the appellant elsewhere in the record.⁷

We recognize, of course, that there may be satisfactory explanations for the apparent contradictions between the appellant's allegations and the data submitted to the contracting officer in support of its claim. We also realize that the possible basis for our jurisdiction to which we referred in our earlier opinion may prove not to exist when all the pertinent facts are known. The appellant has failed to show, however, that the Board was in error when it stated with respect to Claim No. 4: "Primarily we need to know more facts in order to answer the jurisdictional question presented."⁸

Accordingly, the appellant's Motion For Reconsideration of our interlocutory decision of September 21, 1966, insofar as it pertained to Claim No. 4, is denied.

Claim No. 5 (Loss of Commercial Business)

In dismissing Claim No. 5 for want of jurisdiction, the Board took into consideration a number of factors including (i) the fact that the claim was closely related to Claim No. 1 (Cost of Idle Capacity)⁹ and was also related to Claim No. 2 (Loss From Delay In Payments)¹⁰

⁶ See the Findings of Fact of May 18, 1966, in which at Paragraph 68 the contracting officer states: "* * * Since a strike was in effect which shut down construction of American Cement's Clarkdale plant from June 1, 1959 to July 28, 1959, thus commencing over a month before the Glen Canyon Dam strike commenced, it is not apparent how American Cement could have decreased its rate of construction after notice of the Glen Canyon strike as alleged, with the claimed consequence that but for the notice of the Glen Canyon strike, the plant would have been completed 'prior to August 1, 1959.'"

⁷ E.g., the initial claim letter of December 29, 1964 (Findings, Exhibit 1, page 3), in which the contractor states: "* * * On June 1, 1959, the operating engineers commenced a strike affecting all construction jobs in Arizona except the Glen Canyon Project. Subsequently a contract involving the operating engineers was executed on July 28, 1959, effective as of June 1, 1959, and as a result work was resumed on all other jobs." See also the letter of November 13, 1959, from the contractor to the Bureau of Reclamation (Findings, Exhibit 15), in which it is stated: "As you know, it was with some strain and added expense that we tried to meet the August 1 deadline for Dam requirements. This effort was circumvented by an eight week work stoppage caused by the Arizona Operating Engineers' strike. However, on October 1 our mill was brought into production."

⁸ See *Peter Kiewit Sons' Company*, IBCA-405 (March 13, 1964), 1964 BCA par. 4141, footnote 7 ("* * * Additional evidence may be and usually is brought out at a hearing. This additional evidence may change the factual situation. * * *").

⁹ It is simply the reverse side of the coin, as is well illustrated by the following statement: "* * * This 1962-64 loss was occasioned by the fact that the Government required less cement in the years 1959 and 1960 than it contracted for, and subsequently, in the years 1962, 1963, and 1964 required more cement than it had contracted for. In other words, the claims as to the cost of idle capacity and the loss of commercial business are inter-related in that they both resulted from the same or similar acts of the Government in breaching the contract. * * *" (See Reply of American Cement Corporation to Motion to Stay Proceedings, Or, In The Alternative to Remand the Appeal (IBCA-496-5-65, p. 5).

¹⁰ The appellant has defended its failure to present Claims 4 and 5 to the contracting officer prior to filing suit in the Court of Claims on the following grounds: "* * * In not submitting the two claims * * * to the Contracting Officer, Contractor was and is relying on the April 1, 1965, Findings of Fact of the Contracting Officer wherein said Contracting Officer found that he lacked jurisdiction to consider Contractor's claims for (1) cost of idle capacity, and (2) loss from delay in payment. * * *" (See memorandum of Appellant's Counsel of December 23, 1965, IBCA-496-5-65, pp. 2 and 3).

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over which the contracting officer found he was without jurisdiction;¹¹ (ii) the absence of a showing by the Government that there were material issues of fact in dispute which could affect our jurisdiction;¹² (iii) the failure of the Government to demonstrate that the claim as presented was in any way inconsistent with the contractor's statement of the claim in terms of breach of contract;¹³ and the clear inapplicability of the Extras clause to a claim for lost profits.¹⁴

The Government's principal arguments upon reconsideration, as in the earlier proceeding, are based upon its view of what the appellant could or should have claimed rather than upon what it, in fact, did claim.¹⁵ More specifically Government counsel states that in 1962 appellant unquestionably could have made a claim under the Extras clause for the alleged loss in commercial business in that year amounting to 112,000 barrels of cement.¹⁶ The claim was restricted to

¹¹The Government's position is that the contracting officer may possibly have erred in dismissing Claims 1 and 2 as breach claims but that is totally irrelevant to the question of jurisdiction over Claims 4 and 5 if there are provisions in the contract under which the latter claims are cognizable. (See Statement of Government's Position of August 18, 1966, p. 5.) This is true but, as the discussion on pages 18 through 20 of the principal opinion shows, the contracting officer's action in dismissing Claims 1 and 2 as breach claims, precluded the Board from taking jurisdiction over Claim Nos. 4 and 5 in reliance only on the theory that facts related to the requirements contract question were common to all claims and that having a hearing covering all claims would provide a complete administrative record in accordance with the mandate of *Bianchi v. United States*, 373 U.S. 709 (1963).

¹²A careful perusal of the record failed to disclose any material facts which were in dispute. E.g., there was and is no dispute as to the terms of the contract as opposed to the interpretation to be placed upon its various provisions; both parties acknowledge that the quantities of cement ordered by the Government and delivered by the contractor varied substantially from the estimated requirements specified in the contract for the years involved; and neither party contends that the contracting officer received any notice of claim prior to receipt of the contractor's claim letter of December 29, 1964 (Findings, Exhibit 1).

¹³In explaining the basis of its claim for loss of commercial business, appellant's counsel has sometimes referred to extra cement sold to the Government. It is evident that such language has reference to the uncontested fact that quantities of cement were delivered to the Government in excess of the estimated quantities specified in the contract for the years involved. Government Counsel appears to have acknowledged as much at least inferentially in its Motion for Reconsideration of October 12, 1966 (pp. 6 and 7), where the following statement appears: " * * * contractor cannot, merely by claiming breach of contract and asking relief of a nature that is allowable only in breach cases, bypass the administrative remedies provided for in the contract. * * * "

¹⁴In reaching this conclusion the Board was impressed by the vast disparity between the numbers of barrels of cement delivered to the Government during the years 1962, 1963, and 1964 in excess of the estimated requirements therefor and the numbers of barrels of cement upon which the claim for lost profits was predicated, as well as the further fact that the compensation requested by the contractor has no relationship to the formula prescribed in the Extras clause for determining an equitable adjustment. (See discussion on pages 13 to 16 of principal opinion.)

¹⁵" * * * If American considered that orders placed by the Government were in excess of its contract obligation, it should have requested the Government either (1) to restrict orders placed for cement to the amount American Cement considered it was obligated to deliver, or (2) to issue an order for extras under the contract, providing additional compensation above the contract price for cement American considered it was not obligated to furnish." (Government's Motion for Reconsideration, pp. 3 and 4.)

¹⁶" * * * While appellant characterizes its claim for additional compensation for 112,000 barrels of cement in 1962 as 'loss in commercial shipments,' it is apparent that the claim in reality is a pure, everyday, garden variety claim for extras. * * * What appellant overlooks with regard to its claim for additional compensation for cement shipped to the

112,000 barrels, however, only because this represented the appellant's estimate of the amount of commercial business that it had lost in 1962 due to the fact that in that year the Government ordered approximately 244,000 barrels of cement in excess of the estimated requirements for that year. In apparent recognition of the fact that his arguments would completely change the rationale of the claim, Government counsel concedes that if the appellant had requested an order providing additional compensation and if it should be determined that the price of cement as stated in the contract is not fair and reasonable, the appellant would have been entitled to an increase in the price of the entire 244,000 barrels. Contrary to the findings of the contracting officer,¹⁷ Government counsel expresses the view that the anticipated loss of commercial business in 1963 and 1964 "could hardly be ignored as a component of the reasonable price established for the additional cement furnished in 1962 if it was, in fact, in excess of contract obligations and if the claim were made under the Extras clause."¹⁸

In view of the vigor with which the Government has advanced these arguments, we shall first examine the results that would be obtained from the consistent application of the principle, espoused by the Government, to the uncontested facts of record. Then we shall consider what the effect would be upon the claim or claims submitted. Lastly, we shall address ourselves to the question of what warrant there is in existing law for following the course proposed as a means of establishing our jurisdiction over the claim in question.

The adjustments in the claim proposed by the Government are substantial indeed, but they are grossly insufficient if the Government's rationale of the claim is to be determinative rather than that of the appellant. The appellant made no claim for loss of commercial business in 1961 because of problems related to absence of proof.¹⁹ Restating the claim on the basis of the principle advocated, however,

Government in 1962 is that appellant actually sold this 112,000 barrels of cement to the United States Government at the contract price of approximately \$2.30 per barrel. If, as alleged by appellant, a commercial market was available to it for this 112,000 barrels of cement at a price of \$3.45 per barrel, then appellant simply delivered this cement to the Government at a price of approximately \$1.15 per barrel less than appellant states could have been received for the same cement sold on the Arizona market." (Government's Motion for Reconsideration, p. 3.)

¹⁷ In Paragraph 98 of the Findings of Fact of May 18, 1966, the contracting officer states: "On the basis of the foregoing, I conclude as follows: * * * f. Even if a proper basis for a claim for "extras" existed, on the basis of the facts alleged, the claim would be limited to a claim for the difference in returns on cement delivered to the Government in 1962, and the amount American Cement could establish that it would have realized by selling this cement commercially. No basis would exist for loss of commercial sales in 1963 and 1964 when excess plant capacity existed, since any such losses would be speculative, remote, and consequential."

¹⁸ Government's Motion for Reconsideration, p. 5.

¹⁹ In its letter of December 3, 1965 (Findings, Exhibit 4, p. 4), American Cement states: "* * * Since the increase in market penetration over 1960 was substantial even though cement supply was limited, there is no way to estimate the loss in additional penetration which might have been achieved had the dam required only the contract amount. No loss in commercial business is therefore claimed for 1961."

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would appear to present no problem of proof, at least in so far as liability is concerned, since (i) the Government not only concedes that some 173,307 barrels of cement in excess of the estimated requirements of the contract were delivered in 1961,²⁰ but (ii) in connection with 1962 deliveries, speaks of an increase in the contract price applying to the entire amount of the excess deliveries of 244,000 barrels, even though the appellant acknowledges that its loss of commercial business for that year only totaled 112,000 barrels. The amount claimed by the appellant for losses of commercial business during 1963 and 1964 was related to orders by the Government for cement in excess of the estimated requirements for 1961 and 1962, however, only because during 1963 and 1964 the plant capacity available was in excess of commercial and Government requirements for those years.²¹ According to a summary furnished by the appellant,²² the contractor furnished 403,778 barrels of cement in excess of estimated requirements for 1963 and 20,084 barrels of cement during 1964 (a year for which the contract contained no estimate of quantities to be furnished). If all cement delivered in excess of estimated requirements for a particular year is to be the yardstick for determining extras, then it is clear that the entire quantity of excess barrels of cement delivered to the Government during 1963 and 1964 amounting to 423,862 barrels²³ would have to be included in any consideration of the quantity of barrels of cement on which the contractor could conceivably be entitled to an equitable adjustment under the extras clause.²⁴

²⁰ According to the Findings of Fact of March 19, 1965 (IBCA-496-5-65), the actual deliveries were 1,133,307 or 173,307 barrels of cement in excess of the estimated requirements of 960,000 barrels for the year 1961.

²¹ "Cement was available for the commercial market without restriction in 1963, although actual dam requirements exceeded contract requirements by 403,000 barrels. * * * The excess dam requirements of 1961 and 1962 have produced a total loss in commercial shipments conservatively estimated at 386,000 barrels for the years of 1962, 1963 and 1964. The consistent record of increasing penetration demonstrated under conditions of free supply after 1962 are evidence that the excess dam requirements delayed the division from exercising its capability of penetrating the commercial market for approximately one year and produced an effect which continued through 1964 * * *." (Findings, Exhibit 4, p. 5.) See also note 17, *supra*.

²² Findings, Exhibit 4, p. 38.

²³ The quantity used is from the contractor's summary (note 22, *supra*). From the record, however, it is not possible to state the approximate number of barrels of cement delivered in 1963; therefore, it is also not possible to state the extent to which the estimated quantity for that year of 30,000 barrels was exceeded. In the claim letter of December 29, 1964 (Findings, Exhibit 1, p. 4), and in the Petition in the Court of Claims (Findings, Exhibit 2, p. 9), the excess quantities are shown as 366,171 barrels. In the Findings of Fact of March 19, 1965, at page 2 (IBCA-496-5-65), the actual deliveries are shown to be 433,422 barrels or 403,422 barrels in excess of the estimated requirements of 30,000 barrels. The Summary furnished by the contractor (Findings, Exhibit 4, p. 38), shows 1963 deliveries to total 443,778 barrels with the estimated requirements for that year to have been exceeded by 403,778 barrels. This last group of figures reflects a mathematical error of 10,000 barrels but we are not in a position to say with certainty whether the error is in one or the other of the figures shown. We shall assume, however, for the purpose of this opinion only, that the 1963 deliveries of cement were approximately 403,000 barrels in excess of the estimated requirements of 30,000 barrels.

²⁴ These remarks and kindred remarks throughout the opinion are to be read as if they were expressly conditioned by appropriate references to the requirements contract question,

Giving effect to the rationale proposed by the Government as a basic for converting a claim for loss of commercial business into a claim under the Extras clause, the barrels of cement involved are increased from 386,000 barrels (the barrels on which lost profits were claimed) to approximately 841,000 barrels (the total of deliveries in excess of the estimated requirements of the contract for the years 1961 through 1964.²⁵ When this has been done the deliveries in 1961, 1963 and 1964, in excess of the estimated contract requirements for those years occupy exactly the same relationship to the Extras clause as do the 1962 deliveries. Eliminated from consideration is the contracting officer's finding that the amount claimed for loss of commercial business in 1963 and 1964, must be denied as "speculative, remote and consequential."²⁶ The restatement of the claim along the lines proposed by the Government also has the effect of eliminating Claim No. 3 as a separate claim, since if all deliveries in excess of estimated requirements for a particular year are to be considered extras within the meaning of the Extras clause, there is no reason for treating deliveries only in excess of 3,000,000 barrels as cognizable thereunder.²⁷

For purposes of comparison it would be of interest to determine the extent to which the claims involved are affected dollar-wise by the major changes outlined above. This is not possible, however, as no one contends that the contracting officer issued an order in writing under the Extras clause at any time and, in the absence of such an

i.e., we recognize that the Government's principal defense to this and all the other claims of the contractor is that the contract in question is, in fact, a "requirements contract" and that, consequently, the contractor is not entitled to an equitable adjustment of any sort under the Extras Clause, the Changes Clause or any other clause of the contract.

²⁵ The details of the comparison from 1961 to 1964, inclusive, appear below:

Year	Estimated requirements per contract No. of barrels	Actual deliveries approximate No. of barrels*	Excess deliveries approximate No. of barrels*	Loss of commercial business—approximate No. of barrels
1961-----	960,000	1,134,000	174,000	-----
1962-----	900,000	1,144,000	244,000	112,000
1963-----	30,000	433,000	403,000	115,000
1964-----		20,000	20,000	159,000
Total-----			841,000	386,000

* Approximations of figures shown in summary (Finding, Exhibit 4, p. 38) except for 1963 deliveries (Note 23, *supra*).

²⁶ Note 17, *supra*.

²⁷ In the Petition in the Court of Claims (Findings, Exhibit 2, pp. 11, 12), the appellant stated: "11. Invitation No. DS-5023 and Contract No. 14-06-D-2838 provided only for shipments by plaintiff of 3,000,000 barrels. The 3,000,000th barrel under the Contract was shipped by plaintiff in May 1963. Since that time and through October 1964 the Government ordered and plaintiff shipped an additional 87,691 barrels, which the Government paid for at the Contract price of \$2.26 per barrel as escalated. However, the Contract did not provide for said excess barrels over 3,000,000 to be paid at the Contract price. During the period in question the commercial price f.o.b. Clarkdale plant was \$3.45 per barrel, resulting in a per barrel difference of \$1.19. Therefore, at the commercial rate plaintiff is entitled to payment of an additional \$104,352 for the additional 87,691 barrels purchased by the Government either pursuant to Paragraph A-2, 'Extras' of aforesaid Contract or outside the scope of the aforesaid Contract."

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order, the "actual necessary cost" of the work and material involved plus an allowance of not to exceed 15 percent is the prescribed standard for an equitable adjustment. Neither the extra compensation sought for Claim No. 3 of \$1.19 per barrel²⁸ nor the damages claimed for Claim No. 5 of \$2.45 per barrel²⁹ even purport to relate to "actual necessary cost."

Another effect of restating the claim on the basis of the rationale proposed by the Government would be to confront the appellant with problems of notice³⁰ which may or may not be present if the claim continues to be regarded as a claim for breach of contract.³¹ In his findings the contracting officer found that no notice of any claim was given to the Government prior to the completion of deliveries under the contract.³² After quoting from the Protests clause, he found further that the absence of timely notice had been seriously prejudicial to the Government³³ and he specifically refused to waive the contractor's failure to comply with the procedural requirements of the contract.³⁴ While the Board can waive the failure of a contractor to comply with the notice provisions of a contract,³⁵ it will do so only if it is in a position to find that such failure was not prejudicial to the interests of the Government.³⁶

Decision

In our earlier decision we dismissed Claim No. 5 on the ground that the contract contained no provision under which the relief sought by

²⁸ See note 16, *supra*, where, according to the Government's calculations, the contract price is approximately \$2.30 per barrel resulting in a difference of \$1.15 rather than \$1.19 per barrel as shown in note 27, *supra*.

²⁹ " * * * During the period in question the commercial price f.o.b. Clarkdale plant was \$3.45 per barrel and the marginal cost required to manufacture and market was \$1 per barrel, or a loss to plaintiff of \$2.45 per barrel. Therefore, plaintiff has been damaged in the additional amount of \$945,700." (Petition in the Court of Claims, Findings, Exhibit 2, p. 11).

³⁰ The appellant is already confronted with an apparent lack of notice in so far as Claim No. 3 is concerned.

³¹ See *Montgomery-Macri Company & Western Line Construction Company, Inc.*, IBCA-59 and IBCA-72 (June 28, 1963), 70 I.D. 242, 256, 1963 BCA par. 3819, in which the Board stated: "In the last analysis, the claim here at issue is a claim for breach of contract of a type as to which there is no applicable notice requirement in or under the contract."

³² " * * * The first notice of any claims under the contract was given about 5 years after the occurrence of facts now relied upon by American, and was contained in American Cement's letter of December 29, 1964, received by the Government on December 30, 1964." (Findings, par. 50.)

³³ " * * * American Cement's failure to comply with these provisions of the contract has been seriously prejudicial to the Government. With particular reference to the claim based upon acceleration, there was no opportunity for the Government to participate in any decisions the contractor may have made with regard to incurring increased costs, and indeed, the Government cannot now, 7 years later, ascertain as a fact whether there was acceleration of construction of the cement plant beyond what the contractor would have done in the normal course of construction in any event * * *." (Findings, par. 52.)

³⁴ Findings, par. 53.

³⁵ *Korshoj Construction Company*, IBCA-321 (April 29, 1964), 71 I.D. 152, 1964 BCA par. 4206.

³⁶ *Korshoj Construction Company*, IBCA-321 (January 31, 1966), 73 I.D. 33, 66-1 BCA par. 5339.

the appellant was cognizable. The boards have traditionally declined to take jurisdiction of a contractor's claim where they were without authority to effect a final remedy.³⁷ This Board has not hesitated to apply this principle and dismiss a claim in advance of hearing even where a hearing was granted with respect to the remainder of the contractor's claims.³⁸ Recent pronouncements by the Supreme Court in *United States v. Utah Construction & Mining Company*,³⁹ and the Court of Claims in *Morrison-Knudsen Co. v. United States*,⁴⁰ confirm our position that we should not consider breach cases on their merits. This is underscored by two decisions issued by another Board in the same case, one of which preceded and the other which followed the Supreme Court's decision in the *Utah* case, *supra*.⁴¹

Claim No. 5 as presented is unquestionably a claim for lost profits. Over such claims we have no jurisdiction.⁴² Neither in the earlier

³⁷ See *Urban Construction Corp.*, ASBCA No. 10059, 65-1 BCA par. 4866, in which the Board quoted extensively from its earlier decision in *Houston-Fearless Corp.*, ASBCA No. 9160 (Mar. 23, 1964), 1964 BCA par. 4159 ("* * * *The Simmel-Industrie case, supra*, was not a case of the contracting officer's withholding funds but an action for recovery of damages by the Contractor for breach of contract, absent a contract clause allowing adjustment therefor. We have traditionally declined to consider such a case in the absence of our authority to effect a final remedy. * * *").

³⁸ In *Ralph Child Construction Co.*, IBCA-481-2-65 (September 28, 1965), 65-2 BCA par. 5115, the Board dismissed the contractor's claim based upon Government delay in performance of its inspection function where the contract contained no "pay for delay" type clause and there was no dispute with respect to the essential facts, even though the Government's motion to dismiss the remainder of contractor's claims in advance of a hearing was denied.

³⁹ 384 U.S. 394. In the course of its opinion the Court stated at page 412: "Thus the settled construction of the disputes clause excludes breach of contract claims from its coverage, whether for purposes of granting relief or for purposes of making binding findings of fact that would be reviewable under Wunderlich Act standards rather than *de novo*. * * *". This holding by the Supreme Court was relied upon by the Board in *Christy Corporation*, IBCA-461-10-64 and IBCA-569-5-66 (June 20, 1966), 66-1 BCA par. 5630, where in advance of hearing the Government's Motion to Dismiss was granted. (See page 20 of principal opinion.)

⁴⁰ 170 Ct. Cl. 712, 757, 345 F. 2d 833 (1965). The Court denied the contractor's request for a trial *de novo* on the breach of contract issue, finding that the plaintiff had acknowledged that complete relief was available under the terms of the contract for the claim presented and it had been so treated by this Board. More pertinent to our present inquiry, however, is the following statement from the opinion: "* * * In some instances, the boards recognize that they have no jurisdiction and take no action beyond noting that fact. In this case, the IBCA stated that it had no jurisdiction of plaintiff's claim for delay damages due to the winter shutdown. Therefore, the board's action in making findings of fact on that claim was gratuitous and such findings do not preclude or limit a trial *de novo* on the merits of the claim. The judges of the court are unanimously of this view." (170 Ct. Cl. at p. 764.)

⁴¹ In *Doyle & Russell, Inc.*, NASA BCA No. 51, 65-2 BCA par. 4912, the Board retained jurisdiction of what appeared to be a breach of contract case on the grounds that its jurisdiction at least extended to the hearing of such cases. Thereafter, following the *Utah* decision which it cited, the Board in *Doyle & Russell, Inc.*, NASA BCA No. 51 (October 27, 1966), 66-2 BCA par. 5961 stated: "* * * The Supreme Court has recently held that the 'Disputes' clause does not extend to breach of contract claims not redressable under other clauses of the contract. * * * In summary, the Contracting Officer's final decision of June 24, 1963, denied Appellant's claim for relief, not as being unmeritorious, but as being outside the Contracting Officer's authority to grant 'under the terms of the contract.' We also find no basis 'under the terms of the contract' for the relief sought by Appellant. We must, therefore, hold that the claim does not 'arise under the contract' and we are without authority to award relief."

⁴² *William L. Warfield Construction Co.*, IBCA-196, IBCA-202 and IBCA-206 (May 3, 1962), 1962 BCA par. 3374; see also *Harsed E. Sutton, d/b/a Best Janitorial Service*, ASBCA Nos. 7707, 7827 and 7905, 1963 BCA par. 3782.

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proceedings nor in connection with the present motion has the Government shown that the claim, as stated, is cognizable under the Extras clause, the Changes clause or any other clause contained in the contract; nor has the Government shown that there are any facts in dispute which could confer jurisdiction,⁴³ nor that the legal theory relied upon by the applicant is inconsistent with the information furnished by the latter in support of its claim.⁴⁴ Instead, the Government's case has been predicted upon arguments designed to show that the appellant could have framed its claims differently than it did, and that if it had, the claim would have been cognizable under the Extras clause of the Changes clause.⁴⁵

The difficulties attendant upon an undertaking to restate a contractor's claim so as to bring it within the purview of a particular contract clause are well illustrated by examination of the three different theories of how this might be done, as discussed above. In the contracting officer's view the appellant could in certain circumstances have made a claim under the Extras clause for excess deliveries in 1962, but any claim for anticipated future losses of commercial business in 1963 and 1964 in connection therewith would have been denied as speculative, remote and consequential.⁴⁶ On the other hand, Government counsel thinks that not only could a claim have been made under the Extras clause for the excess deliveries in 1962 but that, in establishing a reasonable price therefor, the loss of commercial busi-

⁴³ See note 12, *supra*. The Government's statement that, prior to summary dismissal of the claim as a breach, evidence should be introduced indicating that the contractor was incapable of selling cement to the general public (Government's Motion for Reconsideration, p. 8), brings to mind the old adage about putting the cart before the horse. If, as has been found, we are without authority to grant relief for a claim for lost profits in any case, the holding of a hearing in order to establish whether a contractor, in fact, lost the profits that it claims would appear to serve no useful purpose.

⁴⁴ This distinguishes this case from Claim No. 4.

⁴⁵ Apparently as an afterthought, the Government has also asserted that the facts asserted by the appellant may make the claim cognizable under the Changes clause as a claim for acceleration of the rate of deliveries under the contract during 1961 and 1962 (Government's Motion for Reconsideration, p. 6). Aside from the fact that the appellant has made no such claim, there are no facts of record to support a finding of constructive change. If, as appears to be uncontroverted, the contracting officer knew nothing of the contractor's view of the matter until he received the appellant's letter of December 29, 1964 (Findings, Exhibit No. 1), he can hardly be charged with having done anything or having refrained from doing anything which could be construed as a constructive change. See *Montgomery-Macri et al.* note 31, *supra*, in which the Board stated: "These circumstances present none of the indicia of a change—either actual or constructive. On the contrary, they are typical of a claim for breach of contract. * * *" (70 I.D. at p. 256.). See also *Clifford W. Gartzka*, IBCA-399 (December 24, 1964), 71 I.D. 487, 492, 85-1 BCA par. 4602 ("* * * there is no showing of circumstances which would amount to either an express change or a constructive change in the drawings or specifications of the instant contract and which would justify an equitable adjustment of the contract price. * * *").

⁴⁶ See note 17, *supra*. The concession made by the contracting officer was on a purely hypothetical case as to which the contracting officer stated: "* * * But this hypothetical case bears not even the remotest similarity to the situation here presented and, in fact, presents a complete contrast to a situation where the Government orders cement as it considers its right to do, the contractor furnishes the cement, as it apparently then considers its obligation to do, and then years later submits a claim for additional compensation. * * * ." (Findings, par. 86.)

ness in 1963 and 1964 could hardly be ignored.⁴⁷ In our opinion any claim for loss of commercial business in 1963 and 1964 in such circumstances would simply be subject to dismissal as representing a claim for lost profits over which neither the contracting officer nor the Board would have any jurisdiction. This would have the effect, of course, of further fragmenting the remedies available to the contractor for the alleged wrongs of the Government.⁴⁸

As has previously been shown the contractor's claims can be restated so as to avoid the contradictions noted but the net effect of such action is only to substitute different problems of a still more basic nature. Treating all deliveries in excess of the estimated requirements specified in the contract for the years involved as extras cognizable under the Extras clause, as has been done in the calculations set forth above, has the effect of changing the claim so fundamentally as to make it entirely different from the claim that has been presented for our consideration and decision. Among the principal changes are: (i) the number of barrels of cement to which the claim pertains is more than doubled (841,000 v. 386,000); (ii) the line of demarcation staked out by the appellant between Claim No. 5 (Loss of Commercial Business) and Claim No. 3 (Barrels of Cement in excess of 3,000,000) is obliterated with the result that there would be no rational basis for treating the two claims separately; (iii) the measure of compensation requested by appellant for Claim No. 5 on a per barrel basis would be reduced by more than one-half (\$2.45 v. \$1.19); and the Government is placed in a position to raise procedural defenses to Claim No. 5 (\$945,700) which formerly were unquestionably available only with respect to Claim No. 3 (\$104,352).

The recasting of a contractor's claim in terms materially different from those in which it was presented would appear to be, at best, a somewhat questionable enterprise. Where relief is granted following a hearing, on the basis of evidence supporting a theory not advanced by the parties, the contractor would appear to have no just cause for complaint,⁴⁹ assuming that the contractor was afforded a full opportunity to prove the case it had alleged, but failed to do so. The radical reshaping of a contractor's claim in advance of hearing for the purpose of establishing jurisdiction is regarded as clearly objectionable, how-

⁴⁷ Note 18, *supra*.

⁴⁸ The contracting officer's finding that Claim No. 1 (Cost of Idle Capacity) in the amount of \$1,508,824.88 and Claim No. 2 (Loss From Delay In Payments) in the amount of \$288,296 were without his jurisdiction (and the contractor's failure to appeal therefrom) has resulted in almost 50 percent of the total dollar value of the five claims involved (\$3,677,488.88) being beyond the reach of our jurisdiction in any event.

⁴⁹ *Paul C. Helmick Company*, IBCA-39 (October 31, 1956), 63 I.D. 363, 365, 56-2 BCA par. 1096, may be such a case. The holding is obscured, however, by the fact that the Board never clearly acknowledged that it was granting relief on the basis of a theory that had not been advanced and by the further fact that, in making an award predicated upon Government delays, it was acting under the special statutory authority of the Bonneville Project Act of August 20, 1937 (50 Stat. 731), as amended (16 U.S.C. 1952 ed., sec. 832). See *Paul C. Helmick Co.*, IBCA-39 (July 31, 1956), 63 I.D. 209, 239-242, 56-2 BCA par. 1027.

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ever, not only from the standpoint of fairness to the contractor but also because such a course of action would appear to be largely self-defeating. If the decisions of an appeals board are to be recognized as in some measure entitled to the finality accorded by the application of the principles of collateral estoppel and *res judicata*,⁵⁰ it would appear to be a concomitant that the parties appearing before it have the right to (i) present the claim or the defense on the bases of the legal theories that they have adopted as being applicable, and (ii) to have the issues decided within the context of the allegations that they have made in the light of the available evidence. Hence, we conclude that no party should be compelled against its will to try its cause under the legal theories and allegations advanced on its behalf by the opposing party.⁵¹ To take a contrary position, except in cases where the party concerned is demonstrably in error,⁵² or where the facts of record are clearly contrary to or inconsistent with the claim stated,⁵³ would seem to be a clear denial of an adequate opportunity to present a claim or defense.⁵⁴

For the reasons hereinbefore stated, we find that Claim No. 5, as presented, is not cognizable under the Extras clause, the Changes clause, or any other provision of the contract to which our attention has been directed. We further find that in the circumstances of this case it would be improper to take jurisdiction of the claim on the ground that long before presentment it conceivably could have been stated as a claim arising under the contract and hence subject to our jurisdiction. It appears that there are no material facts in dispute that would warrant our taking jurisdiction, and since there is no showing that a hearing would otherwise serve any useful purpose, the Government's motion for reconsideration of our interlocutory decision of September 21, 1966, in so far as it relates to Claim No. 5, is hereby denied.

⁵⁰ See *United States v. Utah Construction & Mining Co.*, 384 U.S. 394, 421-422, in which the court stated: "Although the decision here rests upon the agreement of the parties as modified by the *Wunderlich Act*, we note that the result we reach is harmonious with general principles of collateral estoppel. Occasionally courts have used language to the effect that *res judicata* principles do not apply to administrative proceedings, but such language is certainly too broad. When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply *res judicata* to enforce repose. * * *"

⁵¹ See *Robert L. Guylor*, ASBCA No. 4822, 58-2 BCA par. 1999 (1958), ("* * * We think a motion to dismiss for want of jurisdiction to grant the relief requested must start with the relief requested and not with relief which an appellant might have, but did not request.").

⁵² The appellant's reference to Paragraph A-5 of the contract, Suspension of Deliveries, in connection with various Claims is an example of such an error. See page 18 of the principal opinion and particularly footnote 35.

⁵³ Claim No. 4 has been scheduled for hearing because the information furnished by the contractor in support of its claim appears to be irreconcilable with the theory advanced for the claim. Depending upon the manner in which the inconsistency is resolved, we may or may not have jurisdiction over the claim.

⁵⁴ Note 50, *supra*.

Summary

Appellant's motion for reconsideration of our interlocutory decision of September 21, 1966, in so far as it relates to Claim No. 4, and the Government's motion for reconsideration of such decision, in so far as it relates to Claim No. 5, are both denied.

It is requested that the parties promptly advise the Board of a mutually acceptable date in February of 1967, for hearing the consolidated appeals.

THOMAS M. DURSTON, *Deputy Chairman.*

I CONCUR:

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

WILLIAM F. MCGRAW, *Member.*

APPEAL OF KINEMAX CORPORATION

IBCA-444-5-64

Decided January 19, 1967

Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Estimated Quantities—Contracts: Formation and Validity: Implied and Constructive Contracts—Contracts: Disputes and Remedies: Equitable Adjustments

Under a contract providing for estimated quantities and unit prices, and stating that increases or decreases in such quantities are to be paid for only at such unit prices, the contractor is entitled to an equitable adjustment for additional quantities performed pursuant to a change order necessitating the duplication of supplementary work that had been completed previously and was not contemplated by the unit prices.

Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal

A claim first presented at the hearing of an appeal will be dismissed as being outside of the jurisdiction of the Board.

BOARD OF CONTRACT APPEALS

The Kinemax Corporation has filed a timely appeal from the contracting officer's denial of a claim for additional compensation arising from the issuance of a change order that increased the quantities of excavation and of clearing and grubbing. The claim, in the amount of \$15,930.52, represents alleged costs in excess of the unit prices allowed by the change order.

Failure to complete the contract within the time required (including an extension of 45 days allowed by Change Order No. 1) resulted in the assessment of liquidated damages in the amount of \$1,150. However, appellant did not dispute the assessment until the hearing of the appeal. At that time the Hearing Officer received evidence concerning appellant's belated claim for further extension of time and recovery of the liquidated damages, subject to later determination by the Board with respect to jurisdiction of the claim.

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It is now clear that the contracting officer had no opportunity to consider the claim for further extension of time, and the evidence confirms that no such claim was ever presented prior to the day of the hearing. The jurisdiction of the Board is appellate only, hence, the claim for extension of time and for recovery of liquidated damages is dismissed.¹

The contract, dated June 20, 1961, was in the total amount of \$211,600 based on approximate quantities and unit prices for various items of work, and included Standard Form 23A, March 1953 edition, as well as other provisions. It called for construction of Main Park Road grading and utilities at Greenbelt Park, adjacent to the Baltimore-Washington Parkway.

The contract provided that quantities in the bidding schedule were approximations only, being subject to increase or decrease, and that payment would be made for the actual amount of work done, based on specified unit bid prices for various items of work, as set forth in pertinent provisions of the General Conditions, which read as follows:

2-17. Estimate of Quantities of Unit Price Items:

The bidder's attention is called to the fact that the estimate of quantities given in the contract, specifications, drawings, or Standard Government Form of Bid is approximate only, is not guaranteed and should not be used without verification by the bidder.²

It is hereby agreed that the quantities shown or listed are approximate only, and are mentioned solely for the purpose of comparing bids, and are subject to either increase or decrease as directed by the Contracting Officer.

2-18. Increased and Decreased Quantities of Unit Price Items:

In case of any increase or decrease in quantities of work or materials, directed by the Contracting Officer, the quantities actually done or furnished shall be paid for at the unit price bid and no claim for loss of anticipated profits shall be allowed in such increased or decreased quantities of work.

4-3. Work to be Done:

* * * * *

The Contracting Officer reserves the right to delete any items at the time of making the award. The Contracting Officer also reserves the right to accept any items not originally accepted or to increase or decrease the quantities on any items prior to completion of the work.

We are concerned only with the following items in the bid schedule:

Item	Approx. quantity	Unit price	Amount bid
Unclassified excavation...cubic yards...	32, 000	\$1.	\$32, 000
Clearing and grubbing.....acres...	18	500	9, 000

¹ Cf. *B. E. McKee Construction Company*, IBCA-502-6-65 (December 28, 1965), 65-2 BCA par. 5296; *A. S. Wikstrom, Inc.*, IBCA-466-11-64 (March 23, 1965), 65-1 BCA par. 4725.

² Appellant had checked the drawings prior to bidding and found that the Government's calculations with respect to quantities of material for fill were correct (Tr. 66).

A hearing upon the appeal took place before the Board in Washington, D.C., on April 27, 1966.

Appellant's excavation subcontractor, Mr. John Cantrell, and Mr. Wayne Stevens, appellant's superintendent, testified that it was intended to use earth cuts from small hills to fill nearby low places on the terrain where the new road, three miles in length, was to be built. One month after road construction began in July 1961, it was discovered that soil taken from cuts was insufficient to fill up the lower levels.³ This condition resulted in the virtual stoppage of the filling operation during the latter part of August or in September 1961,⁴ when most of the cuts then permitted by the drawings had been completed.

For the purpose of correcting the deficiency of filling material, the original drawings were revised between October 31 and November 8, 1961, so that deeper cuts could be taken from higher elevation sections of the terrain. These revisions produced an additional 6,200 cubic yards of unclassified excavation, and one more acre of clearing and grubbing, as reflected later in Change Order No. 1, dated November 27, 1961. The Change Order provided for payment for these items at the specified contract unit price of \$1 per cubic yard for excavation, and \$500 for the one acre of clearing and grubbing, a total price increase of \$6,700.⁵ The time for performance was extended for a period of 45 days.

Upon receipt of the revised drawings appellant promptly resumed the excavating and filling phase of road construction, in "accordance with oral instructions."⁶ In its letter of November 29, 1961, appellant refused to accept the change order dated November 27, 1961, or to accept payment at the originally specified contract unit prices for increased quantities of excavation, clearing and grubbing. Appellant noted an exception to the disallowance of its claim on the final payment voucher submitted by the Government.⁷

The hauling of excavated material from revised deeper cut sections for placement in lower areas to be filled, entailed the use of special rubber-tired equipment designed for hauling longer distances than originally required prior to grade revision. In some instances material

³ Tr. pp. 17-20, 37.

⁴ Tr. pp. 20, 26, 74.

⁵ The change order also authorized additional iron pipe at the contract unit price, so that the contract price was increased in the total amount of \$6,985. The pipe item, however, is not in dispute.

⁶ Letter of November 10, 1961, appellant to Government.

⁷ Appellant's Exhibit No. 11.

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was transported 2 miles along the 3-mile road.⁸ The wear and tear caused by the additional hauling necessitated duplication of grading and rolling of most of the nearly completed road.

At the time of grade revision 31,000 cubic yards of the contract estimated quantity of 32,000 cubic yards of unclassified excavation had been delivered and 75 percent of the contract work had been completed.⁹

Appellant asserts that as the result of the issuance of Change Order No. 1, it was confronted with performance of a new contract different in nature from that originally contemplated by the parties. It argues that unit prices are not applicable under the circumstances here, where the contract estimated quantities of unclassified excavation were increased by a belated change order issued when the entire available quantity of excavated material had already been placed in fill areas and grading had been completed. Appellant was thus compelled to redo much of the work of grading, ditching, moving top soil stockpiles and selective clearing of trees where slopes of cuts were moved back.

By way of defense to appellant's claim, the Government relies on clauses of the General Provisions, *supra*, which authorized increased quantities of unclassified excavation, to be paid for only at the unit price established in the schedule of bids.

Government Counsel argues that Change Order No. 1, which authorized grade revision so that additional earth cuts could be taken for fill, did not change the nature of road building construction contemplated, but was merely designed to achieve the purpose of the contract.

The Special Provisions and the Bid Schedule provided for additional payment at a unit price of \$2 per cubic yard for contingent fill, in the event there was an unbalance between material taken from earth cuts and required fill.¹⁰ Appellant, however, followed the oral instructions and revised drawings issued by the Government and confirmed by Change Order No. 1, providing for the material to be taken from deeper and wider cuts in the already constructed roadway.

In Findings of Fact dated November 8, 1961, pertaining to the issuance of Change Order No. 1, the following statements are made with respect to the reasons for the shortage of fill material:

As work progressed on the project, it became apparent that the cut and fill quantities would not balance with a shortage of fill material. On the site inspection during construction revealed a heavy vegetative overburden and a large

⁸ Tr. pp. 22, 23, 32, 46, 77.

⁹ Tr. pp. 48, 72; Payment Estimate No. 4, October 26, 1961.

¹⁰ "G-4. Contingent Fill:

"The design quantities indicate that there is sufficient excavation to provide for the fills. However, a contingent item to provide for the furnishing of a quantity of additional fill is included in the Schedule of Bids."

amount of root growth which decreased the effective amount of unclassified excavation volume to be utilized as fill. To complete a better balance, the grades are being adjusted to provide an additional 6200 C.Y. of unclassified excavation to meet the fill requirements. The adjusted grades will result in an improved profile for the road.

In providing additional volume of unclassified excavation, one (1) additional acre of clearing and grubbing is required.

We do not arrive at the question of whether a changed condition was encountered within the meeting of the Changed Conditions clause, for the reason that we are already confronted with a change order that was issued for the express purpose of overcoming the effects of the condition whether or not it was a "changed" condition. Because the changes were made after the appellant had completed most of the concomitant and supplementary work of grading the road, ditching, stockpiling of top soil adjacent to the road, dressing slopes and making other preparations for the base course and placing of gravel, much of the work was required to be done a second time. The disturbance of the finished road grade by mass hauling equipment required that it be rolled and graded again.

If the Government had acted promptly¹¹ to correct its errors concerning the quantities of excavation that would be available for fill requirements, before completion of grading, etc., appellant would not have been compelled to perform that work twice, and in those circumstances the contract unit price might be fairly applied to the additional excavation. But we do not think that the contract provisions regarding additional quantities to be paid for at the original unit prices contemplated that appellant could be required to perform additional excavation in areas previously excavated and completed from the standpoint of grading, construction of ditches, placing of stockpiles of top soil and the like, without any additional compensation for doing such completion work all over again. Otherwise (to carry the Government's argument to the point of absurdity), theoretically a contractor could be compelled to repeat the same operations several times, making shallow cuts in successive stages in the same area and completing the grading and similar work between such cuts.

In *Cosmo Construction Company*,¹² the Board observed that:

* * * While a change that is ordered under the changes clause in Standard Form 23A is limited in scope by the change order itself and hence, in the usual situation does not produce compensable changes concerning work not changed,

¹¹ The imbalance appeared in early September 1961, but the Government at that time requested that the contractor complete the earthwork and rely on excavation quantities "north from Goodluck Road" which turned out to be so insufficient as to enlarge the deficiency rather than to alleviate it (Letter of October 31, 1961, appellant to Government).

¹² IBCA-468-12-64 (August 3, 1966), 73 I.D. 229, 234, 66-2 BCA par. 5736.

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it may, as we have noted, generate other legitimate compensable changes by causing unanticipated conflicts or interference. * * *

We have held on several occasions that where work is required to be done a second time in circumstances not contemplated by the contract unit prices,¹³ or where work of a kind not covered by the contract is ordered in connection with work items that are governed by unit prices,¹⁴ the contractor is entitled to an equitable adjustment under the theory of constructive change.

Appellant submitted its claim by letter dated January 16, 1962, in the form of a proposal for negotiating fixed prices totaling \$22,630.52 for the claimed extra work, based on detailed estimates rather than actual costs. This was in partial accordance with Paragraph 2-9, Extra Work, of the General Conditions of the contract, permitting, at the election of the Contracting Officer, (1) the negotiation of a lump-sum price for extra work, agreed upon in advance, or (2) payment of actual costs of such extra work including insurance, social security, unemployment and other applicable taxes plus 15 percent for indirect charges and profit.

The contracting officer in his letter of April 19, 1962, refused to negotiate or pay the amount claimed except on the basis of the established contract unit prices set forth in Change Order No. 1.

After several exchanges of correspondence including a premature notice of appeal,¹⁵ the contractor initiated the present appeal in May 1964.

The data submitted by appellant in support of its proposal for settlement on a lump-sum basis, was not, as we have noted, based on actual costs. It was based on estimates of cost of performance of the extra work, the extent of which was fairly well established. The Board is of the opinion that the claim as presented was a first offer intended to be subject to negotiation, and as such, presumably exceeded the actual costs experienced by the appellant plus overhead and profit. The Government did not present any evidence as to costs, having adhered to its original position that the unit prices established in the contract limited the amounts to which the appellant was entitled to receive in payment for additional quantities of excavation, clearing and grubbing.

¹³ *Tree Land Nursery, Inc.*, IBCA-436-4-64 (October 31, 1966), 66-2 BCA par. 5924 (unit prices not applicable where shrubbery was removed and replanted because of required repairs of underlying utilities); *Peter Kiewit Sons' Company*, IBCA-405 (October 21, 1965), 72 I.D. 415, 65-2 BCA par. 5157 (unit prices not applicable to re-excavation and refill of road embankment).

¹⁴ *Flora Construction Co.*, IBCA-180 (June 30, 1961), 61-1 BCA par. 3081 (unit prices did not include extra work).

¹⁵ *Kinemax Corporation*, IBCA-380 (May 21, 1963), dismissing appeal as premature.

We conclude that the amounts claimed by the appellant have not been firmly established by the evidence as representing the fair and reasonable value of performing the extra work. However, we have previously touched on the contract provisions for "Contingent Fill" in the event that excavation quantities were insufficient to provide for fills. The established bid price for this item was \$2 per cubic yard and we think that such price was intended to fairly compensate the appellant for borrow excavation in areas outside of the roadway, to provide the additional fill that might be required. In the absence of any more reliable evidence we find that the unit price of \$2 per cubic yard for contingent fill is an appropriate measure of the equitable adjustment to which appellant is entitled for additional excavation in the roadway, and for the supplementary work that was required to be done over again as we have described, *supra*.

Additionally, we find that the work of clearing and grubbing one acre on a selective basis, was more costly than contemplated by the unit price of \$500 established by the contract and allowed in Change Order No. 1. While the claim for this work is alleged to be \$1,549.76, we consider that as a first offer looking to negotiation, and not representing actual costs, it is overstated to the extent of approximately fifty percent. Accordingly, we determine that the fair and reasonable value of the additional clearing and grubbing work is \$750, or \$250 over the amount allowed by the contracting officer in Change Order No. 1.

Accordingly, we hereby sustain the appeal in part to the extent of \$6,950 in addition to the amount of \$6,700 allowed by the contracting officer in Change Order No. 1 for the items in dispute.

Conclusion

1. The appeal is dismissed as to the claim for additional extension of time and recovery of liquidated damages.

2. The appeal is sustained in part to the extent of \$6,950 in addition to the amounts allowed by the contracting officer for the items in dispute.

3. The appeal is denied as to all other claims.

THOMAS M. DURSTON, *Deputy Chairman.*

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

I CONCUR:

WILLIAM F. MCGRAW, *Member.*

APPEALS OF PETER REISS CONSTRUCTION CO., INC. AND
LEW MORRIS DEMOLITION CO., INC.

IBCA-439-5-64

IBCA-495-5-65 *Decided January 20, 1967*

Contracts: Construction and Operation: Changed Conditions—Contracts:
Disputes and Remedies: Burden of Proof—Contracts: Construction and
Operation: Drawings and Specifications

Under a contract for demolition of masonry, excavation, and building a structural shell at the base of the Statue of Liberty, where the specifications contained a general requirement for underpinning of existing structures adjoining new work, and where the contractor, from a site inspection and pre-bid discussions, was aware of the possibility that such underpinning would be required to support the foundation of a perimeter wall, the depth of which was not shown in the drawings and was not known by the Government, the contractor's claim that upon excavation it found that underpinning was necessary and that the expense of underpinning such wall should be paid as a changed condition is denied for lack of proof that the wall's foundation was unusually shallow or abnormally constructed.

Contracts: Performance or Default: Suspension of Work—Contracts:
Disputes and Remedies: Equitable Adjustments—Contracts: Construction and Operation: Duration of Contract

Under a contract requiring construction at an early stage of soil bearing footings for the walls of a structure, where a large part of the work is suspended by the Government for more than five months pending redesign of such footings due to unstable soil conditions, and the contractor is thereby prevented for an unreasonable period of time from performing a substantial portion of the work concurrently with its other operations under the contract, and where the Board concludes that the unreasonable portion of such suspension had the effect of extending the period required for completion of the contract for a period of nine weeks, the contractor is entitled to an equitable adjustment pursuant to the standard "Suspension of Work" clause.

Contracts: Performance or Default: Release and Settlement—Contracts:
Formation and Validity: Mistakes—Contracts: Construction and Operation: Intent of Parties—Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal

Where a general release executed on settlement of amounts due under a contract contains exceptions as to certain pending claims but fails to reserve a claim previously made, because of alleged inadvertence on the part of the contractor, such omission precludes consideration of the merits of the claim by the Board and requires its dismissal as being outside of the Board's jurisdiction.

BOARD OF CONTRACT APPEALS

This appeal arose under a contract calling for the construction of a concrete structural shell for the American Museum of Immigration Building around the base of the Statue of Liberty. Construction of the Museum itself was awarded by separate contract.

The work included excavation in earth and concrete, masonry demolition, construction of concrete walls, columns, beams, slabs and associated work by the above contractors, as a joint venture. The original contract price of \$944,220 was increased to more than a million dollars by change orders.

The contract is dated June 8, 1962, and was to be completed within 300 days following receipt of notice to proceed. It was completed within the time required as extended by change orders; consequently, there was no assessment of liquidated damages.

The contract contained the General Provisions for construction contracts, Standard Form 23-A (April 1961 Edition), and the standard "Suspension of Work" clause (Clause 38b) which authorizes an equitable adjustment of the contract price for suspension or interruption of work by the Government for an unreasonable period of time.

Three claims for additional compensation are involved.

Claim No. 1 is for underpinning during tunnel work.

Claim No. 2 concerns excavation difficulties related to the discovery of large masonry and stone structures.

Claim No. 3 is made under the Suspension of Work provision. The appellant contends that its work operations were restricted pending redesign of foundations for the east, west and south walls of the structure.

IBCA-495-5-65

On September 29, 1964, this Board remanded Claims Nos. 1 and 2 (then docketed as IBCA-351) to the contracting officer for issuance of new or supplemental findings on the contractor's contentions with respect to changed conditions.

In a decision issued on April 2, 1965, the contracting officer again denied Claims Nos. 1 and 2. The appeal from that decision was docketed by the Board as IBCA-495-5-65.

IBCA-439-5-64

Claim No. 3, based upon the restriction of work to the north area of the project pending redesign of the supports for the other three walls

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was denied by the contracting officer in Findings of Fact dated April 3, 1964. A timely appeal was entered on May 5, 1964, and has been docketed as IBCA-439-5-64.

A hearing on all three claims took place before the Board on November 16, 17, and 18, 1965, at New York City. Mr. Peter Reiss, president of the Peter Reiss Construction Company, testified on behalf of the appellant (Tr. pp. 6 to 324). The only other witness, Mr. David O. Smith, an architectural engineer and project supervisor, testified for the Government (Tr. pp. 325 to 423).

Claim No. 1 (IBCA-495-5-65) Underpinning—\$3,189.66

This claim asks for payment of the cost (\$3,189.66) of underpinning with concrete columns a section of a perimeter wall. While excavation work for the extension of an existing utility tunnel was being performed, it was found that the bottom of the adjacent perimeter wall was higher than the subgrade of the tunnel. This condition required underpinning beneath a section of the wall.

Mr. Reiss stated that the necessity for underpinning was not discovered until the structures required to be demolished were torn down (Tr. p. 153). Underpinning of the perimeter wall was not specifically required by the drawings or specifications. The concrete columns installed to underpin the wall went down approximately 7 feet (Tr. p. 148). The underpinning columns were not removed, for if this had been done the wall would have collapsed (Tr. p. 145). The use of sheet piling for support of the wall, which was suggested by National Park Service design engineers, was impossible because of structural interference of the ceiling above (Tr. pp. 164 to 167). Standard practice required underpinning and the required support could not have been accomplished by any other method (Tr. pp. 165, 167).

The appellant contends that there was a changed condition, citing (1) the lack of a specific requirement for underpinning, (2) the fact that there was no way to establish the bottom elevation of the perimeter wall during the site inspection made prior to submission of its bid, (3) the permanent nature of the underpinning, and (4) a contention that the appellant had the right to assume that because the Government had designed the tunnel to pass under the perimeter wall, the wall's support must extend below the designed bottom elevation of the tunnel.

The Government in support of its rejection of Claim 1 asserts:

(1) that the appellant in placing the concrete supports was merely complying with the mandate of Clause 5d of Section 1 (Demolition and Earthwork), "When required or directed by the Contracting Officer underpinning of adjoining or abutting structures shall be performed in an approved manner;" (2) that the Government did not know how far down the perimeter wall extended and therefore should not have been expected to include a specific underpinning instruction; and (3) that the possibility of the need for underpinning should have been apparent to the appellant, since it knew where the utility tunnel extension was to be located underground, and could observe the above-ground position of the perimeter wall.

In a letter to the contracting officer dated October 11, 1962, the appellant claimed that at the time of site inspection, prior to bidding, the appellant had questioned Government representatives (architects) "concerning the depth of all the walls which would be adjacent to the new structure, and particularly whether we would require any underpinning. We were informed that there would be no necessity for any underpinning." One of the architects named by the appellant advised the contracting officer that although he was asked about wall depths, he did not recall stating that underpinning would not be required. He had a "faint recollection about being asked where certain specified work was located" and had replied that "the specification clause was to cover the possibility that it [underpinning] would be needed."

The parties seem to have let drop the matter of pre-bid discussions. Neither of the witnesses at the hearing testified with respect to such discussions. From the appeal record one definite conclusion may be reached. The appellant at the time of bid preparation foresaw that a problem of support would exist if the bottom of the perimeter wall did not extend below the lowest point of the tunnel.

The contractor's counsel is correct in stating in his post-hearing brief that it was impossible to see the bottom of the perimeter wall or to know the elevation to which it extended until substantial demolition work had been done. The Board is not in agreement, however, with his statement that there was no reason "to suspect that the walls would not go below the bottom elevation of the tunnel." The appellant did not establish that the wall foundation was unusually shallow or abnormally constructed. A contractor seemingly would have had as much reason to expect the undermost portion to terminate above the tunnel, or within its reach, as to count upon it extending so deep that no problem was created.

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In the circumstances, the \$3,189.66 underpinning work requirement on this million dollar project must be viewed as an incidental feature of the utility tunnel, not as correction of a changed condition. Claim No. 1 is denied.

Claim No. 2—\$8,250

By a letter dated October 22, 1962, appellant stated that it had "uncovered many large masonry and stone structures such as cesspools, walls, etc., between the North side of the base and the South side of the old underground structures that were uncovered in the first contract, as shown on Drawing #2."

This claim was originally denied by the contracting officer the following day, October 23, 1962. Although the letter of denial (Exhibit "D" attached to Government's post-hearing brief) did not advise the appellant of its right to appeal therefrom, the parties treated it as a final decision under the "Disputes" clause. The appellant filed an appeal dated October 30, 1962. In December 1962, the Government transmitted the appeal file to the Board, together with the Government's statement of position.

On February 11, 1965, after the claim had been remanded by the Board's September 29, 1964 decision (IBCA-351), the appellant transmitted a "breakdown" of the claim that had been submitted in its letter of October 22, 1962. The total amount sought, \$8,250, was listed as the value of excavating and disposing of 300 cubic yards of material, and placing and compacting 300 cubic yards of backfill.

On April 2, 1965, the contracting officer issued new findings of fact and a decision in which the claim was again denied. He noted in the new findings that they were issued "in compliance" with instructions in the Board's opinion dated September 29, 1964 (IBCA-351). One of the reasons given for denial of Claim No. 2 was that the appellant had failed to except or reserve it in a release executed on July 21, 1964 (Exhibit "E" attached to decision of April 2, 1965).¹

Government counsel in the Statement of the Government's Position, at the hearing, and in his post-hearing brief, moved for dismissal of Claim No. 2 because it was not reserved in the general release signed by appellant on July 21, 1964. The issue of the Board's jurisdiction pertaining to Claim No. 2 therefore must be resolved at this point.

The appellant in an effort to overcome the effect of the release relies upon the rule cited in *Winn-Senter Construction Co. v. United States*, 110 Ct. Cl. 34, 64-65 (1948), that a claim may be prosecuted despite

¹ Claims Nos. 1 and 3 were specifically excepted in the release.

the execution of a general release where the conduct of the parties in continuing to consider the claim after such execution makes it apparent that they did not consider the release to constitute an abandonment of the claim. That rule may not be applied in this appeal because the contracting officer and the department counsel have raised the defense afforded by the contractor's execution of the release in the findings, briefs and statements issued subsequent to the furnishing of the release.

The Board, when it remanded the matter for the issuance of new or supplemental findings on Claims Nos. 1 and 2, had not been advised of the existence of the release. The statement of the Government's position in IBCA-351 was filed by the department counsel many months prior to the time when the release was given, and therefore did not discuss it. Testimony with respect to Claim No. 2 was taken at the hearing, but only upon the basis that a ruling on the Government's motion to dismiss would be held "in abeyance until the decision is prepared by the Board." (Tr. 36.)

When a claim is released by a party, through inadvertence that must be viewed as a unilateral mistake of omission, further consideration of the claim is barred.² There has been no showing that the Government contributed in any way to the appellant's "inadvertent" release of Claim No. 2. The appellant's contention that the claim was not included in the exceptions to the release because it was pending before the Board at the time the release was given must be regarded as unconvincing, since two of the three claims that the contractor did include on the "list of our three claims" also were before the Board on July 29, 1964, when the release was signed.

The appeal record does not provide a reason to place Claim No. 2 within one of the exceptions to the general rule that failure to reserve a claim item from the effect of a general release precludes consideration of the claim on its merits.³ Claim No. 2 is dismissed.

Claim No. 3

Appellant's third claim, in the original amount of \$82,071.47, was reduced to \$77,262.97 at the hearing of this appeal (Tr. p. 309, App. Ex. 11). It is made on the theory that appellant is entitled to an increase in the costs of performance, pursuant to the standard "Suspension of Work" clause. The appellant asserts that the Government

² *H. L. O. & Associates Construction Company, Inc., v. United States*, Ct. Cl. No. 317-64 (June 10, 1966).

³ *Monarch Lumber Company*, IBCA-217, 67 I.D. 198, 60-2 BCA par. 2674 (May 18, 1960); *Roscoe Engineering Corp. and Assoc.*, ASBCA No. 4820, 61-1 BCA par. 2919 (January 16, 1961).

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unreasonably interrupted its work schedule for approximately 22 weeks by holding up all work during this period on the east, west and south sides of the monument, pending redesign of wall foundations in those areas.

In July 1962, the appellant furnished a progress schedule to the Government. That schedule (Exhibit No. 6) listed June 26, 1962 as the starting date for contract work, and gave a planned completion date of April 21, 1963. The appellant began its work on July 6, 1962.

Soil bearing footings were prescribed by the contract drawings for the structural steel walls. Such footings were satisfactory for the north wall, but after the Government's project supervisor became concerned about the suitability of the subsurface area on the east side the Government produced a new drawing for the east wall and gave it to the appellant in mid-October 1962. At that time the appellant was informed that further investigations were to be made to determine the conditions in the area where the south wall was to be constructed. (Tr. 383-85.) Eventually it was learned that redesign of the foundation work for the east, west and south areas was necessary (the new drawing furnished in October for the east side was not utilized).

A Government architect started to revise the drawings for the east, west and south areas as the result of a visit that he made to the site in September 1962. The contractor's complaint about the time taken for the redesign was stressed in cross-examination of the Government's project supervisor as follows: (Tr. 387.)

Q. Is that correct? It took from September 24th until this drawing was issued and delivered to us [March 20, 1963], for you to resolve the question of these foundations, Appellant's Exhibit 8?

A. I didn't resolve the question.

Q. When your department could resolve the question?

A. In conjunction with the consulting engineer.

Q. And that's a government man?

A. He's employed by the government, as a consultant.

* * * * *

Mr. MORGULAS: The date of Appellant's Exhibit 8 is March 20, 1963. Six months.⁴

The notification required by the "suspension of work" clause was given by the appellant in a letter dated November 21, 1962. That letter stated (i) that the appellant's work was being substantially hampered, pending redesign of the foundations, (ii) that its operations, due to

⁴ The drawings showing the foundation revisions for the south and west sides were not received by the appellant until May 13, 1963. Exhibit Nos. 10a and 10b.

the necessity of redesign of the "East, and South areas, have been and will necessarily continue to be confined to a very small area, viz, the Northeast section of the lobby," (iii) that the appellant's operation had been made "costly and inefficient" because of the unavailability of the redesign, and that this would be the case until work could proceed "simultaneously in the Northeast, South and East areas—which would be a normal job operation."

The appellant wrote again on February 8, 1963, noting that the "project has now been delayed for several months pending your redesign of the foundations on three sides to meet unanticipated subsurface conditions." The letter also stated that the restricted job area had resulted in a "wastefully inefficient job operation for which we shall expect appropriate reimbursement," and asked for acceleration of exploratory work and for the taking of "all steps necessary to expand the scope of the work area."

A letter from the contractor dated March 2, 1964, asserted once more that the period taken by the Government to furnish a redesign had substantially curtailed the productivity of its labor force and equipment.⁵ The rationale for the amount originally demanded under Claim 3 followed:

* * * our payroll for the period from October 10, 1962 to April 22, 1963 totalled \$130,272.16 * * * for the work produced we received \$253,544 * * * production earned for each dollar of labor expended during this period of our restricted operations was \$1.93. * * * from April 22, 1963 to September 20, 1963 we expended the sum of \$176,677.55 and for the work produced we received \$452,591.95, so that the production earned for each dollar of labor expended during the period when our operations were no longer restricted, was 2.56. * * *

The appellant then advised that 63¢, the difference between \$2.56 and \$1.93, represented the "difference in the productivity of our labor force" for each dollar of labor "expended during the period in which our operations were restricted to the North side of the project."

The contracting officer's findings with respect to Claim 3 first made reference to the fact that "out-of-doors" construction of the type undertaken by the appellant could be curtailed by unfavorable weather conditions. The findings next referred to the four soil bearing tests that, under Section 1A of the contract, were to be made by the contractor "at locations as directed by the Contracting Officer." A discussion followed of the additional compensation and contract performance

⁵ The appellant's president testified that if change orders containing final redesign information had been received on November 1, 1962, the project could have been finished at a time "very close" to the "original contract time." (Tr. 312.) The project supervisor disagreed with this assertion. (Tr. 346.)

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time allowed in change orders for the "extra work" necessary due to the discovery of unstable soil conditions. The findings then observed:

From the above your contract period was changed from approximately ten to fifteen months and from this fifteen month period, which covers two summer seasons, you have chosen the six winter month period of normally low labor productivity for comparison with peak production during five months of the 1963 summer season as a basis for the computations contained in your * * * letter of March 2, 1964.

The remainder of the findings is largely devoted to assertions that the contractor did not perform "exploratory work" and "general excavation" in the East, West and South wall areas during the fall of 1962, and the 1962-63 winter period. In denying the claim, the contracting officer gave no affirmative consideration to the question of whether or not the Government in studying the need for, and in obtaining the new drawings for wall footings, had unreasonably delayed the appellant.

The obligation of taking the job in hand and restoring the original situation in which all project areas were available for construction work clearly was that of the Government, not of the appellant, in the fall of 1962, and during the 1962-63 winter. In late September and early October, the Government lost confidence in its original design for the footings. The appellant was informally requested to stop work on the East wall in early October. (Tr. p. 62.) Shortly thereafter, work on the South and West sides was stopped in the same fashion, and the appellant was advised to await further instructions. (Tr. pp. 66, 69, 73.)

The Government's project supervisor's job diary does contain references to suggestions that he made from time to time that the appellant could proceed with soil exploratory work even though the contracting officer had not directed such work in accordance with Section 1A, or that it could proceed with certain preliminary work on the South area. Taking into account the Government's definite conclusion that soil conditions in East, West and South areas were unsuitable for the originally planned footings, and that the Government had not informed the appellant of the necessary redesign, we are unable to conclude that the appellant erred in waiting for a formal change order. The Government issued instructions in Change Order No. 6, which was dated January 7, 1963, and was mailed to the contractor on January 22, 1963 (appellant's counsel has pointed out that the Government has given no reason for the two-week delay in transmittal). Change

Order No. 6 directed the excavation of test pits that would provide information for the redesign. The Government's project engineer spotted locations for the test pits on January 28, January 30, February 4, February 6, February 7, and February 22, 1963. (Tr. 357-58.) On most of the pits the appellant performed the exploratory work as ordered immediately after the pits were located by the Government's project supervisor. (Tr. 358.)

The Government alleges that the appellant cannot prevail in its "suspension of work" claim because it agreed to monetary adjustments that were included in ten change orders issued under the contract. Each of those change orders describes, and makes payment for, specific items of work. There is no indication in any of them that an adjustment is included for the "suspension of work" claim. Accordingly, that claim was not covered by any change order and must be considered upon its merits.

The Government states that the facts in this case "clearly do not support the theory that there was any unreasonable delay in the making or formulation of the changes in question." We have concluded, however, that the Government was responsible for a serious and unreasonable delay in ordering the exploratory tests and obtaining the redesign for the wall footings. In a recent Court of Claims decision,⁶ it is stated:

In addition, the defendant was dilatory both in recognizing the need for and making appropriate revisions to the defective foundation plans. * * * Upon finally recognizing that the subgrade rock was unsatisfactory, defendant or its agents should have completed the redesign of the foundation *with all due haste* so that plaintiff could have continued the foundation work without any significant delay. (Italics added.)

The *Luria Brothers* decision (footnote 6) involved a construction contract that dollar-wise was half again as large as the one in this case. Unsuitable bearing material was found on April 17, 1953. Foundation work was stopped on April 24, 1953. Revised drawings were issued on May 25, 1953; however, the Government rescinded a portion of the revised plan and issued further revisions on July 15 and July 20, 1953. The court referred to the Government's action in correcting the plans as "extremely slow" and "dilatory."

In the Board's view, if the Government had acted with reasonable promptness in securing new foundation plans for the East, South and West sides, the necessary revisions and change orders would have been furnished to the appellant no later than November 15, 1962. Because

⁶ *Luria Brothers & Company, Inc. v. United States*, Ct. Cl. No. 475-59 (December 16, 1966).

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the Government delayed until the spring of 1963 to furnish them, appellant is entitled to an equitable adjustment under the "suspension of work" clause.

The Government took approximately four months too long to deliver the redesign, but the appeal record would not support a conclusion that an over-all delay of four months in the time required for job completion resulted from the serious delay in redesign.

At about the time that the appellant gave its first notification of the constructive suspension of its operations (in its November 21, 1962 letter), the parties agreed to Change Order 4 (dated November 14, 1962) and Change Order 5 (dated November 27, 1962). By these change orders the contract completion date was extended 21 days, to May 12, 1963. In our view, the time needed to complete the project would have extended to that date even if the redesign delay and the need for extensive changes had not come into play. It is necessary, therefore, to find the portion of the May 12, 1963–October 2, 1963 period spent on Liberty Island by the appellant that would not have been required if the redesign had been furnished in timely fashion.

Taking into account the original contract amount and time, the testimony of the Government's project supervisor (Tr. 352), and the type of work added by Change Order No. 6 through Change Order No. 10, the Board concludes that 38 days is the reasonable additional time for the work added to the project by those orders (which increased the contract total by approximately \$99,000). A further reduction should be made in the 105-day period that remains because of planning errors, faulty workmanship and other delaying factors for which the appellant must bear the sole responsibility. The project supervisor's diary⁷ contains detailed accounts of the appellant's own problems on the job, which at times required substantial additional work. Six weeks is not an unreasonable length of time to allocate to the delay caused by the appellant's job deficiencies. Accordingly, it is found that the Government unreasonably delayed the contract work by a total of nine weeks.

The Government has not disputed the logic of the appellant's original plan to perform work at the same time on more than one side of the structure, and to fully perform all work within 300 days. The project required a great deal of expensive support activities. A dock was constructed and maintained on the island, and a concrete plant was

⁷ Exhibit Nos. E-1 and E-2.

set up on the job site. (Tr. 57.) In order to transport men from New Jersey it was necessary to rent a fishing boat and dock space for the boat. (Tr. 57.) A supervisory force and many pieces of equipment were brought to the site at or near the start of the job, and remained until the project was completed. (Tr. 58-59.)

In arriving at an equitable adjustment the Board has excluded profit in accordance with the requirement of Clause 38b, and has made other adjustments considered to be warranted. From its analysis of Exhibit Nos. 11, 12, E-1, E-2 and the remainder of the appeal record, the Board establishes the sum of \$28,260 as the amount due to the appellant under Clause 38b of the contract.⁸ Claim No. 3 is allowed in that amount.

Conclusion

Claim No. 1 is denied. Claim No. 2 is dismissed. Claim No. 3 is allowed in the amount of \$28,260 and denied as to the balance sought by the contractor.

DEAN F. RATZMAN, *Chairman.*

I CONCUR:

I CONCUR:

WILLIAM F. MCGRAW, *Member.*

THOMAS M. DURSTON, *Deputy Chairman.*

JOHN V. STEFFENS ET AL.

A-30601

Decided January 26, 1967

Oil and Gas Leases: Applications: Sole Party in Interest

Where a person files an oil and gas lease offer through a leasing service under an arrangement whereby the leasing service advances the first year's rental, selects the land, and controls the address at which the offeror may be reached, but no enforceable agreement is entered into whereby the offeror is obligated to transfer any interest in any lease to be issued to the leasing service, the service is not a party in interest in the offer merely because it may have a hope or expectancy of acquiring an interest, and the offeror is not precluded from stating that he is the sole party in interest in the offer.

Oil and Gas Leases: Applications: Sole Party in Interest

The regulation which requires that an oil and gas lease offer, "when first filed," be accompanied by a signed statement of the offeror identifying all

⁸ In reducing the 22-week period and the amount of the adjustment shown for Claim No. 3 in the appellant's claim documents the Board has taken into account a redeeming feature of the project work area as it actually was available in the October 1962 to March 1963 period. Work could proceed on the north side at all times during the Government's long delay in obtaining a redesign for the other three sides. Because of this the contractor was able to earn between 55% and 60% of its total contract earnings by March 1, 1963. (Tr. 196, Monthly Estimate No. 7 and No. 8.)

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interests in the offer does not require an offeror, who states that he is the sole party in interest, to disclose an agreement to sell his lease entered into by him after the filing of his offer but before the time of the drawing of simultaneous lease offers in which his offer participates, and his offer cannot be rejected on the ground that he did not comply with the regulation in failing to disclose the interest of his vendee.

Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Assignments or Transfers

An act, in order to be collusive, must result from an agreement, scheme or plan involving more than one party, and the fact that a particular lease assignment, if agreed upon by the parties to the assignment prior to the filing of the lease offer which resulted in issuance of a lease, would have demonstrated collusion in the filing of the offer does not mean that the same transaction shows collusion in the absence of evidence of a prior agreement between the parties to the assignment.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

John V. Steffens and G. W. Allen, in his representative capacity as president of Central Southwest Oil Corporation, have appealed to the Secretary of the Interior from a decision dated February 9, 1966, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed separate decisions of the New Mexico land office rejecting noncompetitive oil and gas lease offers New Mexico 0556281 and 0556869, filed by John V. Steffens and Beulea A. Jessup, respectively, pursuant to section 17 of the Mineral Leasing Act, as amended, 74 Stat. 781 (1960), 30 U.S.C. sec. 226 (1964).¹

The facts upon which this appeal is based are relatively simple and are not in dispute. John V. Steffens and Beulea A. Jessup, in whose names the respective lease offers were filed, applied for Federal oil and gas leases through Central Southwest Oil Corporation, an oil and gas lease filing service. Both offers were submitted under "Plan 2," one of three plans offered by the corporation to prospective clients. Under the terms of the plan an offeror furnishes the \$10 filing fee required by the Government and a \$10 service fee charged by the corporation, and he signs an oil and gas drawing entry card for each tract of land for which application is to be made. The corporation

¹ G. W. Allen appealed to the Director, Bureau of Land Management, in his own name, and his notice of appeal to the Secretary was filed in his own name only, without reference to Central Southwest Oil Corporation. From information subsequently furnished, however, it appears that Allen was at all times acting in behalf of the corporation and that the appeal of Allen is and has been, in effect, an appeal by the corporation. It further appears that Allen is no longer president of the corporation and that he has no interest in the corporation or in this appeal. Beulea A. Jessup, the nominal offeror in the second lease offer considered here, did not appeal from the decision of the land office.

advances funds for the first year's lease rental and is authorized by the client to file an offer or offers in the client's behalf for land which the corporation is to select and which it "would desire to immediately purchase." The corporation is also authorized to have the Bureau of Land Management return advance rental funds for unsuccessful offers directly to the corporation's office, and, in practice, the mailing address of the corporation or a mailing address under its direct or indirect control, rather than the client's own address, is furnished as the offeror's address of record. The instruction sheet explaining the plan is designed so that the offeror, by signing the sheet and returning it to the corporation, authorize the procedure outlined. He also certifies that he is the sole party in interest in the offers to be made in his behalf.

In accordance with the foregoing procedure lease offer New Mexico 0556281 was filed in the land office for Parcel No. 101 during a simultaneous-filing period, 10:00 a.m., January 18, 1965, to 10:00 a.m., January 25, 1965, and lease offer New Mexico 0556869 for Parcel No. 84 was included in the filing of offers during a simultaneous-filing period, 10:00 a.m., March 15, 1965, to 10:00 a.m., March 22, 1965. The offers were drawn at public drawings of simultaneously filed lease offers conducted pursuant to regulation 43 CFR 3123.9 on February 8, 1965, and April 1, 1965, respectively, and thereby earned priority over other offers filed for the respective parcels of land described.

On February 1, 1965, subsequent to the filing of lease offer New Mexico 0556281, but prior to the drawing to determine priority, Steffens accepted an offer dated January 29, 1965, whereby Central Southwest Oil Corporation agreed, in the event the offer should obtain first priority, that it would pay Steffens a sum of \$3,200 for all of the lands embraced in the lease with a 1 percent of $\frac{8}{16}$ ths total overriding royalty to be reserved to the original offeror. By an instrument dated April 5, 1965, Beulea Jessup and her husband, Alvin H. Jessup, agreed to sell, and Central Southwest agreed to purchase the offeror's interest in the lease to be issued pursuant to lease offer New Mexico 0556869 for the sum of \$3,114, and by another instrument the Jessups assigned such interest to Central Southwest subject to the reservation of an overriding royalty of $1\frac{1}{4}$ percent.²

By separate decisions dated September 17, 1965, the land office found Central Southwest to be an interested party in the offers and rejected the offers for failure of the offerors to disclose G. W. Allen or Central

² The land office stated in its decision rejecting Mrs. Jessup's lease offer that sometime "between March 25th and April 1st, they [the Jessups] accepted Mr. Allen's offers to purchase for \$3,114 with a $1\frac{1}{4}$ percent overriding royalty and returned the instruments."

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Southwest as an interested party as required by 43 CFR 3123.2(c) (3)³ and for collusion as defined in 43 CFR 3123.3(a).⁴

In affirming the rejection of the lease offers the Office of Appeals and Hearings found that Central Southwest or the "Allen Group" filed a large number of offers on behalf of other offerors for the same parcels for inclusion in the same drawings, that the filings for Parcel No. 84 included the offers of two of the officers of Central Southwest, and that all such offers enhanced Central Southwest's chance of obtaining a lease or an interest therein. It also found that the use of the drawing entry cards of mailing addresses that were under the direct or indirect control of Central Southwest effectively served Central Southwest's plan and prevented other parties from contacting the offerors except through Central Southwest and that the cumulative effect of

In appealing to the Director, Bureau of Land Management, appellant Allen denied the accuracy of this finding of the land office and, in support of his contentions, submitted a copy of the agreement dated April 5, 1965, and of the instrument of assignment bearing the date of April 3, 1965, and acknowledged before a notary public on April 5, 1965. Thus, while it is not entirely clear on what date the assignment was actually executed there is no evidence in the record of an assignment or agreement to make an assignment which was executed on or before the date of the drawing on April 1, 1965.

³43 CFR 3123.2 provides in pertinent part that:

"Each offer when first filed, shall be accompanied by:

* * * *

(c) * * *

(3) A signed statement by the offeror that he is the sole party in interest in the offer and the lease, if issued; if not he shall set forth the names of the other interested parties. If there are other parties interested in the offer a separate statement must be signed by them and by the offeror, setting forth the nature and extent of the interest of each in the offer, the nature of the agreement between them if oral, and a copy of such agreement if written. * * *

The Department has held that this requirement is mandatory and that a lease offer must be rejected without priority when there is not compliance with the regulation. *Genia Ben Ezra et al.*, 67 I.D. 400 (1960).

⁴The regulation provides in part that: "When any person, association, corporation, or other entity or business enterprise files an offer to lease for inclusion in a drawing, and an offer (or offers) to lease is filed for the same lands in the same drawings by any person or party acting for, on behalf of, or in collusion with the other person, association, corporation, entity or business enterprise, under any agreement, scheme, or plan which would give either, or both, a greater probability of successfully obtaining a lease, or interest therein, in any public drawing, held pursuant to § 3123.9, all offers filed by either party will be rejected. Similarly, where an agent or broker files an offer to lease for the same lands in behalf of more than one offeror under an agreement that, if a lease issues to any of such offerors, the agent or broker will participate in any proceeds derived from such lease, the agent or broker obtains thereby a greater probability of success in obtaining a share in the proceeds of the lease and all such offers filed by such agent or broker will also be rejected. Should any such offer be given a priority as a result of such a drawing, it will be similarly rejected. * * *

the procedure followed, coupled with the filing of large numbers of offers for the same parcels in the same drawings, constituted a scheme or plan, within the meaning of 43 CFR 3123.3(a), for obtaining a greater probability of success in obtaining an interest in a lease. The Office of Appeals and Hearings did not make a specific finding with respect to the other basis for the rejection of the offers, *i.e.*, that Central Southwest was an undisclosed party in interest in the offers.

In appealing to the Secretary the appellants contend in substance that:

(1) Regulation 43 CFR 3123.3(a) provides for the rejection of lease offers only where circumstances exist which are the result of an agreement, scheme or plan; there was no express agreement here, and none has been alleged to have existed, and the Bureau's finding of a scheme or plan is the result of an interpretation of the circumstances and of the regulation which is not necessarily valid; and

(2) The Bureau has not been consistent in its interpretation of 43 CFR 3123.3(a), and the appellants have been subjected to discriminatory treatment in the rejection of the subject lease offers while other offers, filed under similar circumstances, have been accepted and leases issued pursuant thereto.

In support of the latter contention appellants have submitted evidence of the use of a common address by more than one offeree in the filing of simultaneous offers in each of the months of January through December 1965 which resulted in each case in the issuance of a lease. In addition, they have outlined in detail the difficulty experienced by an officer of Central Southwest in attempting unsuccessfully to obtain the address of a successful offeror whose listed address was that of the filing service through which his offer was submitted. They state that, to the best of their knowledge, formal offers to purchase have not been submitted to clients by other filing service companies, as was done by Central Southwest, but that other companies have continued to state in their advertising materials that they would purchase any lease drawn by a client for a specific cash figure per acre or a stated percentage amount if the lease were offered to the filing service immediately after the drawing or within a specified time after the drawing, and they assert that Central Southwest has amended its business practices to conform with what appears to be acceptable to the Bureau, while other companies continue successfully to operate under their established procedures. They state that they do not necessarily

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ask that the procedures which Central Southwest has used in the past be approved or exonerated, but they request that the Bureau's decision be reversed on the basis that the rejection of the leases in question will only further confirm the Bureau's inconsistent, arbitrary and discriminatory application of the regulations under these facts and circumstances.

We consider first the question whether by virtue of the filings under "Plan 2" Central Southwest had an interest in the offers so that Central Southwest was required to be named as a party in interest pursuant to 43 CFR 3123.2(c) (3), *supra* fn. 3.

There are a number of factors which raise questions as to the interests which were represented by the lease offers in question. We note particularly the following items:

(1) The use of a common address through which any communication from another party to a client-offeror must pass, without disclosure of the actual address of the client;

(2) The advancing of funds for the first year's rental payment by the agent without any form of security;

(3) Authorization of the agent to exercise complete control in the selection of lands to be filed upon and, particularly, to select lands which the agent desires to lease; and

(4) The filing of numerous lease offers on behalf of clients and corporate officers for the same parcel of land in the same drawing (92 offers for Parcel No. 101 and 29 offers for Parcel No. 84).

The Bureau did not find any one of the procedural steps followed by Central Southwest constituted a violation of a specific regulatory provision, but, as we have already noted, it found that the cumulative result of all of those steps was a scheme or plan which enhanced Central Southwest's likelihood of success in obtaining an interest in a particular lease which it might desire to own.⁵

⁵ In defining an "interest" in a lease the Department has provided that: "* * * No one is, or shall be deemed to be, a sole party in interest with respect to a lease in which any other party has any of the interests described in this section. The requirement of disclosure in an offer to lease of an offeror's or other parties' interest in a lease, if issued, is predicated on the departmental policy that all offerors and other parties having an interest in simultaneously filed offers to lease shall have an equal opportunity for success in the drawings to determine priorities. Additionally, such disclosures provide the means for maintaining adequate records of acreage holdings of all such parties where such interests constitute chargeable acreage holdings. An 'interest' in the lease includes, but is not limited to, record title interests, overriding royalty interests, working interests, operating rights or options, or any agreements covering such 'interests.' Any claim or any prospective

Various schemes have been devised to secure an advantage for an individual or a group in a drawing of simultaneously filed lease offers, and on numerous occasions the Department has found it necessary to determine whether or not an offeror represented to be the sole party in interest was that in fact, whether the filing of lease offers for inclusion in a drawing was collusive, or whether the chances for success of one offeror were increased by the inclusion in the same drawing of the offer of another offeror for the same tract of land, with or without collusion (see, e.g., *McKay v. Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955); *Clifton Carpenter*, A-22856 (January 29, 1941); *Edward A. Kelly*, A-22856 (August 26, 1941); *Antonio DiRocca et al.*, A-26434 (July 11, 1952); *Evelyn R. Robertson et al.*, A-29251 (March 21, 1963); affirmed in *Robertson v. Udall*, 349 F. 2d 195 (D.C. Cir. 1965); *Schermerhorn Oil Corporation, Kenwood Oil Company*, 72 I.D. 486 (1965)). In each of the cited cases the Department found either an express agreement or an understanding among certain lease offerors or a business relationship or financial interest of one offeror in the offer of another offeror which, even in the absence of any agreement, precluded a finding that each offeror was, in fact, the sole party in interest in the lease offer which he filed, or it found that the interest which one offeror held in the offer of another offeror resulted in an improved likelihood that the first offeror would obtain an interest in a lease issued pursuant to a drawing of simultaneously filed offers.⁶

There would seem to be little question but that Central Southwest hoped, by the procedure employed, to enhance its chances of obtaining

or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an 'interest' in such lease." 43 CFR 3100.0-5(a).

⁶ In the *Carpenter* and *Kelly* decisions, *supra*, for example, the Department found that, notwithstanding the affidavits of all of the offerors involved that each had filed in his own behalf and had no agreement or understanding with any other offeror, the filings were made at the behest of and for the benefit of one of the applicants or his firm. In the *DiRocco* decision, *supra*, it was found that the lease offers were filed under power of attorney given by the nominal applicants to an association whereby the association was to exercise practically complete control over the leases to be obtained and was to receive the major benefits from the leases. In the *Robertson* case, *supra*, the agreement between agent and clients provided, *inter alia*, that the clients would promptly execute and deliver to the agent assignments of all leases acquired as a result of offers made pursuant to the agreement and that, upon a sale by the agent of any such lease, the client should receive one-half of the profits from the sale of the lease which sold at the highest price and the agent should retain any proceeds in excess of that. In the *Wahlenmaier* and *Schermerhorn* cases, *supra*, the Department found, *inter alia*, mutual interests of offerors which gave certain offerors approximately 1-¼ and 1-½ chances of success in drawings.

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an interest in, or of sharing in the profits from, a lease issued to one of its clients pursuant to a drawing.⁷ A hope or expectation of sharing in the profits of a lease issued to any one of a number of lease offerors, however, is not the same as the right to share in such a lease, and in this respect the present case differs from those cited, for in each of the former the interest which one party claimed in the lease offer of another was of such a nature as to be enforceable in law or in equity. This has not been shown to be so in the present case. The record does not establish the existence of any agreement, formal or informal, whereby Central Southwest's clients under "Plan 2" agreed, prior to the filing of their lease offers, to assign a lease interest to the corporation. The most that Central Southwest obtained under the arrangement, as far as the record shows, was a calculated likelihood that a successful client would feel a sense of duty to give Central Southwest the first opportunity to obtain an assignment of a lease which, coupled with Central Southwest's direct means of communication with the client, would give it a practical advantage over competitors in securing an interest in the client's lease. Undoubtedly, Central Southwest could bring an action to recover the amount of the rental payment advanced to a client, but we see no basis upon which it could successfully assert a claim of interest in a lease in the event a client elected not to accept its offer to purchase the lease. Thus, while we recognize the advantage obtained by Central Southwest, we are unable to conclude that this expectancy constitutes an "interest" within the meaning of 43 CFR 3100.0-5(a).

Although we have concluded that at the time when the Steffens and Jessup offers were executed and physically filed Central Southwest was not a party in interest in the offer and any lease to be issued, the situation changed prior to the date of the drawing in which the Steffens offer participated. Prior to that date Steffens entered into an agreement with Central Southwest to sell his lease to the latter if he were successful in the drawing. Central Southwest thereupon became a party in interest in the offer prior to the date of the drawing.

This raises the question as to the point in time at which an offeror's statement that he is the sole party in interest in his lease offer must

⁷ From information obtained by the Bureau in an investigation referred to in the decision of February 9, 1966, it appears that Central Southwest was not indiscriminating in the loaning of money to clients for lease rental purposes and that only those clients were accepted under the plan who appeared likely to be willing to sell their leases, if they were successful, to Central Southwest.

be true. The Department requires, as we have already noted, that an offer, "when first filed," shall be accompanied by the offeror's statement as to interested parties in the offer. There is nothing in the Department's regulations, however, to prevent the assignment of a lease interest between the time of filing of the offer and the issuance of a lease. Except where a lease offer is filed for inclusion in a drawing of simultaneously filed offers, priority of an offer is established at the time of the physical act of filing the offer in the land office. When an offer is filed pursuant to 43 CFR 3123.9, however, for inclusion in a drawing of simultaneously filed offers, the physical act of filing is not determinative of priority. Rather, the regulation provides that all offers filed pursuant thereto during the prescribed period will participate in a drawing in which one offer will be drawn. All of the lease offers filed during that period are stamped by the land office as having been received 10:00 a.m. on the fifth working day after the posting of the list of lands available for leasing. But while this constructive time of filing is officially recorded as the time of filing of the successful offer, the actual determination of priority, or the selection of the successful offeror, is not accomplished until the drawing is conducted some time thereafter. In other words, the official time of filing represents neither the actual time of filing nor the time at which priority is determined. In order to effect compliance with the regulation, then, must the statement of interest be made as of the time of the physical act of filing, the constructive time of filing, or the time of the drawing which determines priority, or must the initial statement of interest remain valid, and lease ownership remain static, during the entire period from the execution of the lease offer through the drawing?

If, between the time of the filing of a lease offer and the drawing which determines the priority of that offer, the offeror may assign his interest in the offer to another party, of what value is the offeror's statement that he is the sole party in interest in the lease? Can we tell from that statement whether the assignee has, through the assignment, obtained more than one chance for success in the drawing or whether the offer, if filed in the assignee's name, would have caused him to exceed his authorized holdings? Obviously, we cannot, and it may well be that the Department's objectives can be accomplished only if a lease offeror in a simultaneous filing is required to make a continuing disclosure of the creation of any interest in his offer between the time of filing and the drawing which determines priority. How-

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ever, we are unable to conclude that the present regulation imposes this requirement.

The phrase "when first filed" was incorporated into the regulations before the adoption of the present method for determining priority of offers by public drawings, and at a time when the act of filing alone determined the priority of an offer. The problem which now confronts us existed only in fortuitous or limited circumstances for there was usually no reason for a lease offeror to attempt by subterfuge to increase the number of his offers for the same tract of land, and the term "when first filed" referred to a clearly definable point of time. With the modification of the system for determining priority among lease offers, and the consequent befogging of the significance of filing noted above, there was no modification of the regulations to provide for a special treatment of simultaneously filed offers except that they should be considered to be filed as of a time designated by the land office.

The Department has consistently refrained from imposing a regulatory requirement upon an applicant unless the requirement is so clearly set forth that there is no basis for noncompliance (see *William S. Kilroy et al.*, 70 I.D. 520 (1963); *John J. King*, A-30472 (February 28, 1966)). We cannot find here in the regulation at issue, 43 CFR 3123.2(c)(3), a clear requirement that the sole party in interest statement, required when the offer is first filed, must speak at all times from the physical filing of the offer to the drawing of the offer. We must conclude therefore that the sole party in interest regulation was not violated by failure to disclose the existence of the sale agreement between Steffens and Central Southwest.

A fortiori, there was no violation of the regulation in the case of Mrs. Jessup's offer since her agreement to sell her lease to Central Southwest was not executed until after the date of the drawing.

As for regulation 43 CFR 3123.3(a), *supra* fn. 4, we are unable to find any collusion involved in the filing of the Steffens and Jessup offers under "Plan 2." It is inherent in the term "collusion" that there be an agreement or scheme involving more than one participant (see Black, *Law Dictionary* (4th ed. 1951)). There is no evidence that Steffens or Mrs. Jessup, in availing themselves of the services offered by Central Southwest, sought directly or indirectly to further the interests of anyone other than themselves. The fact that Central

Southwest may not have devoted itself single-mindedly to the interests of its clients does not convert its self-serving intent into collusion.

We must conclude that the present record does not show any violation of the pertinent regulations which would require the rejection of the Steffens or Jessup offer.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is reversed and the case is remanded to the Bureau of Land Management for further consideration of the Steffens and Jessup offers.

ERNEST F. HOM,
Assistant Solicitor.

RAYMOND J. STIPEK
R. A. KEANS

A-30644*Decided February 1, 1967***Officers and Employees**

A corporate officer, as long as he acts in good faith, is not precluded, as an individual, from engaging in a business similar to that carried on by the corporation of which he is an officer, and, if the evidence fails to show that there was an obligation on his part to act for the corporation with respect to a particular matter, he violates no legal or moral duty if he acts for himself in the same matter.

Oil and Gas Leases: Applications: Drawings

Where two officers of a corporation, who constitute all of the stockholders, directors, and officers of the corporation, as individuals, file noncompetitive oil and gas lease offers for the same land for inclusion in the same drawing of simultaneously filed lease offers, and no offer is filed on behalf of the corporation, it is not necessarily to be presumed that the individual offers are filed for the corporation, and where there is no evidence that the offerors breached their fiduciary duty to the corporation so as to create a corporate interest in their offers, the offers should not be rejected on the ground that the corporation had more than one chance in the drawing or that the statement in each offer that the offerer is the sole party in interest was false.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Raymond J. Stipek and R. A. Keans have appealed to the Secretary of the Interior from a decision dated April 26, 1966, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed decisions of the Riverside, California, district and land office canceling Stipek's noncompetitive oil and gas lease Riverside 02767 and rejecting his noncompetitive lease offers Riverside 04759 and 05040, filed pursuant to section 17 of the Mineral Leasing Act, as amended, 74 Stat. 781 (1960), 30 U.S.C. § 226 (1964), and acquired lands lease offer Riverside 03248, filed by Keans pursuant to the Mineral Leasing Act for Acquired Lands, 61 Stat. 913 (1947), 30 U.S.C. §§ 351-359 (1964).

Oil and gas lease offer Riverside 02767 was issued to Stipek effective February 1, 1964, pursuant to a lease offer filed on March 25, 1963, for inclusion in a drawing of simultaneously filed lease offers. By a decision dated September 28, 1964, the Riverside office canceled the lease

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and, at the same time, rejected lease offer Riverside 04759.¹ By a decision dated September 25, 1964, the Riverside office rejected lease offer Riverside 05040, included in a simultaneous filing on April 27, 1964, and by a decision dated October 15, 1964, it rejected Keans' lease offer Riverside 03248, filed on May 27, 1963. The decision in each instance was made upon the same basis.

It appears from the record that each of the appellants was, at the time the lease offers were filed, an officer and principal stockholder of Keans, Springmann and Stipek, Inc., a corporation organized for the purposes of acquiring, holding and disposing of oil and gas leases, as well as for other related purposes, that Keans was president and Stipek was vice president, secretary and treasurer of the corporation, and that each owned 50 percent of the stock of the corporation. The record also indicates that at the time of the filing of each of the lease offers in question by one of the appellants an offer was filed by the other appellant for the same land for inclusion in the same drawing. The corporation itself did not file a lease offer for inclusion in any of the drawings, and each offeror stated in each lease offer that he was the sole party in interest in the offer.

Relying upon *McKay v. Wahlenmaier*, 226 F. 2d 35 (D.C. Cir. 1955), the Bureau found that neither appellant could escape from the fiduciary relationship which he bore to the corporation, that, within the Department's definition of "interest,"² the corporation was considered to have an interest in any lease offer filed by either appellant and, thus, to have more than one chance of acquiring an interest in a lease issued pursuant to a drawing which included offers of both appellants, and that the filing of offers by both appellants constituted a violation of the Department's policy that each interested party in a simultaneously filed oil and gas lease offer should be limited to a single chance of obtaining an interest in a lease issued pursuant to the drawing. The Bu-

¹ Lease offer Riverside 04759 described land which initially had been included in lease offer Riverside 02767. At the time of the issuance of lease offer Riverside 02767 the land office deferred action as to that particular land, permitting the offeror subsequently to file a separate offer for the land with priority from the date of the original filing.

² " * * * An 'interest' in the lease includes, but is not limited to, record title interests, overriding royalty interests, working interests, operating rights or options, or any agreements covering such 'interests.' Any claim or any prospective or future claim to an advantage or benefit from a lease, and any participation or any defined or undefined share in any increments, issues, or profits which may be derived from or which may accrue in any manner from the lease based upon or pursuant to any agreement or understanding existing at the time when the offer is filed, is deemed to constitute an 'interest' in such lease." 43 CFR 3100.0-5.

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reau further held that the offerors were disqualified for failure to disclose the interest in their offers of the corporation, and it found that there was no evidence in the record that the corporation disclaimed an interest in the lease offers and that there was no express authorization found in the articles of incorporation for the appellants to take and hold oil and gas leases individually and apart from the corporation.

Appellants contend, in substance, that *McKay v. Wahlenmaier*, *supra*, has no application to the case at bar and that there was no breach of a fiduciary relationship in the filing of the individual lease offers in question. They further contend that the cancellation of lease offer Riverside 02767 was not authorized in any event.

The Bureau's determination that Keans, Springmann and Stipek, Inc., must be considered to have an interest in each of appellants' lease offers, we believe, resulted from an improper extension of the doctrine in *McKay v. Wahlenmaier*, *supra*. In that case Culbertson & Irwin, a corporation, filed an application for a lease in a simultaneous filing situation. The application was signed by E. A. Culbertson, the president and director of the corporation and an owner of 23.7 percent of the stock. Later Culbertson filed an application in his own name as an individual, and so did Wallace W. Irwin, vice president and a director of the corporation and an owner of 19.3 percent of the stock. Culbertson's application was drawn first and a lease was issued to him. The question before the court was whether Culbertson's lease should be canceled in view of the three filings made by him, the corporation, and Irwin.

The court found, *inter alia*:

That Culbertson was in a fiduciary relationship with the corporation is beyond dispute, for it is universally held that the directors and officers of a corporation, particularly its president entrusted with its management, occupy such a relationship. *Whether he violated his duty as a fiduciary must be determined.* 226 F. 2d at 44 [italics added].

Examining the facts, the court found that if Culbertson, the president of the corporation, was in truth filing solely in his own behalf, and not that of the corporation, he was competing with the corporation for a valuable business opportunity which he knew the corporation was desirous of obtaining for itself, and it concluded from this that Culbertson should be held, as a matter of equity, to have applied for a lease on behalf of the corporation.

The Bureau, in holding here that appellants should be found to have

applied on behalf of their corporation, has concluded that a corporate interest exists in the lease offers from the mere existence of the fiduciary obligation of the offerors without considering the question which the court found necessary to determine in *McKay v. Wahlenmaier*, that is, whether the fiduciary duty would be violated by appellants' individual acts of acquisitiveness. The Bureau also found that the corporation had not disclaimed any interest in the lease offers in question and that no express authorization was contained in its articles of incorporation for the appellants to take and hold oil and gas leases individually and apart from the corporation. It did not, however, cite any authority to the effect that these were prerequisites to the right of the appellants to engage in separate leasing operations.³

The law generally applicable to the question of fiduciary responsibility has been stated as follows:

Corporate officers and directors, so long as they act in good faith toward their company and its associates, are not precluded from engaging in a business similar to that carried on by their corporation, either on their own behalf or for another corporation of which they are likewise directors or officers. So long as he violates no legal or moral duty which he owes to the corporation or its stockholders, an officer or director is entirely free to engage in an independent competitive business. * * * 3 *Fletcher Cyc. Corp.* (Perm Ed) § 856 (1965 Rev.).

The doctrine of "corporate opportunity" * * * is but one phase of the cardinal rule of "undivided loyalty" on the part of fiduciaries. In other words, one who occupies a fiduciary relationship to a corporation may not acquire, in opposition to the corporation, property in which the corporation has an interest or tangible expectancy or which is essential to its existence. * * * *Id.* § 861.1.

There is a vast field for individual activity lying outside the duty of a director, yet well within the general scope of the corporation's business. The test seems to be whether there was a specific duty, on the part of the officer sought to be held liable, to act or contract in regard to the particular matter as the representative of the corporation—all of which is largely a question of fact. If there is no such duty, then the director or other corporate officer may acquire outside interests, although the corporation may be more or less interested.

* * * "It must be borne in mind that because one is a stockholder and officer of a corporation he is not thereby bound to act only on behalf of that corporation." If the evidence fails to show that there was an obligation on the part of the president or general manager to purchase the property in question for their corporation or to offer the same to such company, they or either of them have the right to purchase it for themselves. * * * *Id.* § 862.

³ We note here that in *McKay v. Wahlenmaier*, *supra*, the by-laws of the corporation expressly authorized the officers to hold oil and gas leases in their individual capacities. The effect of this provision, however, was not discussed by the court; in fact there is no indication that the court was aware of this authorization.

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It has been stated that:

From an examination of the cases it is at once apparent that the concept of what constitutes a "corporate opportunity," which a corporate officer or director is precluded from embracing in his individual capacity, is, to say the least, indefinite and uncertain. Some courts define a corporate "opportunity" as being property in which the corporation has an "interest or tangible expectancy," or which is essential to its existence. [Citations omitted.]

In *Durfee v. Durfee & Canning, Inc.*, 323 Mass. 187, 199, at page 204, 80 N.E. 2d 522, 529, the court approved the statement in *Ballantine on Corporations*, that "the true basis of the doctrine (corporate opportunity) should not be found in any expectancy or property interest concept, but in the unfairness on the particular facts of a fiduciary taking advantage of an opportunity when the interests of the corporation justly call for protection. This calls for the application of ethical standards of what is fair and equitable to particular sets of facts." *American Investment Co. of Ill. v. Lichtenstein*, 134 F. Supp. 857, 861 (E.D. Mo. 1955).

It is amply clear from these statements that the mere existence of a fiduciary relationship between the appellants and their corporation would not create a corporate interest in the filings made by the appellants. The Bureau was therefore in error in holding that it did. The critical question then is whether the appellants breached their fiduciary duty so as to create a corporate interest in their offers.

In *McKay v. Wahlenmaier*, *supra*, there could be no question but that Culbertson's offer, if intended for his own benefit, was in direct opposition to the interests of the corporation which he represented in a fiduciary capacity since the corporation filed an offer in its own right. Because Culbertson knew that the corporation wanted the lease and that acquisition of the lease was in the corporation's line of business and because he was competing with it for a potentially valuable business opportunity, the court concluded that Culbertson would be held in a suit brought by the corporation or a stockholder to hold his lease for the use and benefit of the corporation.

We do not have the same situation here. There is no evidence in the form of an offer filed by the corporation that the corporation was directly interested in obtaining leases on the lands applied for by the individual offerors. There is no other evidence of interest unless that interest is to be conclusively presumed from the nature of the corporation's business. The cited authorities clearly indicate that such a presumption is not conclusive and that, even if it were, the violation of a fiduciary duty would not automatically be found in the acquisition of the business opportunity by a corporate officer but that the particular

facts of each case must be examined to determine the nature of the interests involved.

The fact that the corporation did not file offers is evidence that the corporation was not interested in obtaining leases on the lands applied for by the appellants. In fact, the only available evidence in the record is that the corporation was more or less inactive. In an affidavit executed on June 7, 1965, in a prior matter, Stipek stated that:

The business of the Corporation was primarily that of acting as agent in the acquisition of oil and gas leases for private individuals and companies. As an incidental activity, the Corporation occasionally filed offers for United States oil and gas leases in its own behalf. In no instance when the Corporation filed an offer for a United States oil and gas lease did I file an offer for lease on the same land, and to the best of my knowledge and belief, neither did KEANS. The records of the Bureau of Land Management will confirm this fact.

In the summer of 1962 KEANS and I gave consideration to the matter of having the Corporation discontinue business entirely. After that time the Corporation filed no offers for United States oil and gas leases.

Thereafter I filed offers for oil and gas leases on my own behalf and for my own account, and KEANS filed on his own behalf and for his own account.

This statement indicates that all the officers, directors, and stockholders of the corporation, namely, Keans and Stipek, decided the corporation would no longer file offers. This decision, of course, would be completely within the power of the appellants. We think, also, that there is no question but that the appellants could agree between themselves that the corporation had no interest in the acquisition of a particular business opportunity and thereby free each other from any obligation to act in behalf of the corporation in seeking that opportunity. Unquestionably, the relationship of each appellant to the corporation is that of a fiduciary, and he is required to act in his personal business activities in a manner consistent with that trust. (See, e.g., *Durfee v. Durfee & Canning Inc.*, 80 N.E. 2d 522 (Mass. 1948), in which one member of a two-man corporation was held accountable to the corporation for secret profits which he realized from business dealings with this corporation under the guise of another corporation which he controlled.) But where there is a duty owed to a corporation there must, in fact, be a duty owed to some person or persons. If all of the officers and stockholders of a corporation agree upon a course of action which may be detrimental to the corporation as such or which may result in its dissolution, can the corporation, unrepresented by anyone having an interest in the corporation, maintain an action in its own right against the officers and stockholders?

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Obviously, it cannot, and the question of fiduciary duties does not arise in the case of such concerted action. The duty of a fiduciary to his corporation, then, is his duty to the other officers, directors and stockholders of the corporation, and if he has violated no duty to any of these he has breached no trust with respect to the corporation.

This discussion assumes that appellants, as the sole stockholders, officers, and directors of the corporation, decided that the corporation would not file offers in the situations before us and that each appellant could file on his own behalf. Assume, however, that this was not so, that there was no agreement between the appellants, and that each filed on his own behalf in disregard of his fiduciary duty to the corporation. In this situation there would have been a breach of a fiduciary trust by both appellants. However, we seriously question the ability of the corporation to maintain an action against either offending party, for the party instituting suit on behalf of the corporation would be guilty of the identical act of bad faith toward the corporation with which he charged the other party.

We are unable then to perceive in the facts presented here any situation whereby the corporation would derive an interest in the filings made by the appellants and therefore have an unfair advantage over other offerors, necessitating the vitiation of appellants' offers. The corporation having no interest in appellants' offers, the statement in each offer that the offeror is the sole party in interest is correct. Thus both grounds for the Bureau's decisions, multi-chances of the corporation in each drawing and falsity of the sole party in interest statement in each offer, are bereft of substance.

Accordingly, it was error to reject appellants' applications upon the sole basis of the corporate relationship, and, in view of this conclusion, we find it unnecessary to consider at this time the second issue raised by the appeal, *i.e.*, the authority of the Secretary administratively to cancel lease offer Riverside 02767.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is reversed, and the case is remanded to the Bureau of Land Management for appropriate action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

GEORGE AND SUSIE BUGAS ET AL.

A-30655

*Decided February 17, 1967***Grazing Leases: Preference Right Applicants**

An applicant for a renewal of a section 15 grazing lease may assert a preference right under the exception clause of that section based upon the ownership and control of cornering land even though more than 90 days have elapsed since the land originally became available for leasing, especially where he or his predecessors have asserted such a right from the time when section 15 leases first became available.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

George and Susie Bugas and Lawrence G. Bugas have appealed to the Secretary of the Interior from a decision dated April 25, 1966, of the Chief, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of the Rock Springs, Wyoming, district office rejecting their application filed on October 4, 1965, to renew a grazing lease for sec. 12, T. 13 N., R. 117 W., 6th P.M., Wyoming, issued to them pursuant to section 15 of the Taylor Grazing Act, 48 Stat. 1275 (1934), as amended, 43 U.S.C. sec. 315m (1964), and awarding the lease to Marian and Arthur Larson.

Section 12 is an isolated tract of public land not situated in a grazing district. The appellants or their predecessors in interest have held several successive section 15 grazing leases for section 12, the latest of which expired on October 24, 1965. The appellants own section 14, which corners on section 12. On August 3, 1965, Arthur and Marian Larson, who lease sections 11 and 13, contiguous to section 12, filed an application to lease the same land.

Disposition of the land for grazing purposes is controlled by section 15, *supra*, which provides in pertinent part: * * *

That preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, except, that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease * * *.¹

¹ The pertinent regulation restates the statute thus:

The act, as amended, provides for the issuance of grazing leases to classes of applicants in the following order:

"(a) Preference-right lease to applicants who are the owners, homesteaders, lessees, or other lawful occupants of lands contiguous to or cornering on an isolated or disconnected

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The district office had notified both the appellants and appellees by letter dated July 29, 1965, that the current lease was to expire on October 24, 1965.

After an attempt to have the parties agree to a division of the land proved unsuccessful, the district office ruled that the appellant's preference right had expired, while that of the appellees was alive.

On appeal the Bureau first held, in a decision dated March 1, 1966, that the appellants had filed within the 90-day preference period, that they were equal preference claimants with the appellees, and that the lease should be awarded on the basis of all the pertinent facts. It then reconsidered and in the decision now on appeal held that the 90-day preference period applied only when the land was initially offered for lease, that section 12, along with other lands, was offered for lease by departmental notice of July 31, 1937, 2 F.R. 1380, 56 I.D. 478, and that the Bugases had no preference right, while the Larsons did as lessees of contiguous land. It thereupon vacated its first decision and affirmed the district office award of the lease to the Larsons.

On appeal the Bugases assert that section 12 is essential to their operation, and that they have a preference right equal to the Larson's for a lease.

We believe that the appellants' contentions are sound. While the issue does not appear to have been ruled upon directly, there are several Departmental decisions which examine the evolution and purpose of section 15 in detail and recognize the preference right of "cornering" applicants to lands which have long been under a section 15 lease. In the first decision, *The Swan Co. v. Banzhaf*, 59 I.D. 262 (1946), Swan, an assignee of a lessee, had held a section 15 lease in several isolated or disconnected sections on the basis of a preference right as the owner or controller of contiguous land. When the lease expired in January 1943, Swan no longer owned or controlled contiguous land, but offered as base ownership or control of cornering land, which had not been used as base lands. The Department held—

tract embracing 760 acres or less for the whole of such tract, upon the terms and conditions prescribed by the Secretary, provided by the preference right is asserted during a period of 90 days after such tract is offered for leases." [Footnote omitted.]

"(b) Preference-right leases to applicants who are owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit the proper use of such contiguous lands."

"(c) Leases where no preference-right applicant is involved." 43 CFR 4122.1-2.

* * * Grazing-lease applicants for such lands who are cornering landholders are therefore to be regarded as on a par with grazing-lease applicants who are contiguous landholders. And since both are preference applicants, on equal preference levels, the extent to which a lease will be granted to any applicant having such a preference right is a matter to be determined by the Department in the light of other pertinent factors. *Id.* 270.

The effect of this decision is somewhat diminished by its later conclusion that Swan had a contractual preference right to a new lease under the provisions of its expiring lease. *Id.* 274-275.

Several years later, however, the Department again, in *John White et al.*, 60 I.D. 272, 277 (1948), dealt with the issue of the preference right of a cornering land holder upon the expiration of his new lease in the absence of a contractual preference right to lease. Although the facts are somewhat complicated, they may be summarized as follows: The Whites had held section 15 grazing leases on certain isolated or disconnected tracts for varying terms from December 29, 1936, offering as base both contiguous and cornering lands. On September 18, 1946, their last lease, which did not have a contractual preference right of renewal, expired. The Whites then, having lost control of the contiguous land, applied for a 10-year renewal, offering as base only cornering lands. Their application was opposed by the Boslers who relied upon contiguous lands to establish a preference right.

In reversing the award of the lease to the Boslers the Department held there were considerations which precluded such an award, stating

Chief among these is the intention of the Congress with respect to cornering owners, as shown by the legislative history of the 1936 amendment of section 15 of the Taylor Grazing Act. As originally enacted in 1934, this section provided for leases only of very large tracts, isolated or disconnected tracts of a 640-acre section or more, and only to *owners of contiguous lands*. In this form, the provision was soon found to be inadequate and unfair, and its revision was urged. In a letter of January 3, 1935, the Secretary of the Interior wrote to the Chairman of the House Public Lands Committee, in part, as follows:

"* * * The aggregate acreage of tracts of public land comprising less than 640 acres is considerable, and it would seem proper that its use for grazing should be regulated by lease. *Our brief experience with this section has also demonstrated that in many instances the persons who have the greatest need for such isolated tracts, while living in the immediate vicinity, are ineligible to lease them because of the contiguous requirements.*" [Footnote omitted.] [Italics supplied.]

On August 20, 1935, the Congress passed a bill amending the Taylor Grazing Act and containing numerous provisions which the Department found objectionable. One of these affected section 15. It met part of the Secretary's criticism quoted above by extending the leasing provision to isolated or disconnected tracts of less than a 760-acre section [footnote omitted], but it continued the contiguity

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requirement, although authorizing leases to "homesteaders, lessees, or other lawful occupants of contiguous lands," instead of simply to owners thereof. On August 26, 1935, in a comprehensive memorandum criticizing all the objectionable features, the Secretary urged the President to withhold his approval. [Footnote omitted.] On September 5, 1935, the President vetoed the bill, appending the Secretary's memorandum to his veto message.

With respect to the proposed leasing provision, the Secretary commented on the incidents of the checkerboard-land pattern in railroad-grant areas such as that here involved. Emphasizing the unfair effects of the mandatory character of the contiguity requirement, he said:

"* * * Consider the effect in an area such as that in which odd-numbered sections have been granted to a railroad and even-numbered sections remain largely in public ownership. These public lands are all in the category of 'isolated and disconnected tracts,' while the contiguous sections are railroad lands. It is common knowledge that vast areas of these railroad lands have been sold or leased to large and powerful stock-raising interests. Under the terms of the act under consideration the occupant of the railroad lands and no one else would be entitled to lease the intervening even-numbered sections. Thus this provision patently would operate for the benefit of the large holder."

"The small stockman who has taken a stock-raising homestead on an even-numbered section in such a region would find himself in a sad plight for the reason that no homestead is contiguous to checkerboarded public lands. He would be deprived of all right or opportunity to acquire by lease or otherwise any other even-numbered section in the region. It is the wise intent of the grazing act of 1934 that, commensurate with proper use, the small owner shall be given at least an equal opportunity with his more powerful neighbor to enjoy the benefits of regulated grazing on the public lands. This will not be possible if this act becomes law." [Italics supplied.]

In addition, the Secretary declared that the proposed leasing provision would help defeat the fundamental objectives of the Grazing Act, and, again, that he was unwilling to set the stage for the abandonment of homesteads by small owners under the pressure from livestock interests which would follow the signing of the act.

During the next year, the Public Lands Committees of the Congress reconsidered their position. They dropped the objectionable features of the vetoed bill, and they met fully the Secretary's objection to the mandatory contiguity requirement of section 15. In the exception clause of the proviso, they extended the leasing system to "owners, homesteaders, lessees, or other lawful occupants" of cornering as well as contiguous lands, giving cornering holders as well as contiguous holders a 90-day-preference right to lease the whole disconnected tract, and thus protecting holders of even-numbered sections, of whom homesteaders and homestead patentees are perhaps the most numerous class. The new proposals were passed by the Congress and approved by the President on June 26, 1936, section 15 being in the form quoted above on page 273.

In taking this action, the Congress recognized fully the implications of the checkerboard-land pattern in railroad-grant areas and the inequities of the

1934 leasing system. It also expressed its clear intent to remedy these injustices and to protect the owner or lawful occupant of even-numbered, cornering sections against checkerboard disadvantages by placing him on an equal lease footing with the owner or lawful occupant of odd-numbered, contiguous sections. The fact that exercise of the leasing right by a cornering applicant might involve his trespass on contiguous lands at a common-section corner neither deferred the Congress from conferring the right nor caused it to make such trespass a matter of Federal concern. The Congress did not condition the right upon no trespass in its exercise. As the Department has previously said, "any question of trespass on privately owned lands in traveling to exercise the use of Federal range is a matter to be settled between the parties or in the local courts, not in this Department. * * * Nor can such possibility affect the right of this Department to lease such checkerboard public lands." [Footnote omitted.]

In addition, the Department has said that where competitors do not come to an understanding but leave their disagreements to the administrative process, this Department must render its decision in accordance with the legal rights and the equities of the parties. [Footnote omitted.] Among such equities, the Department has found the urgent need of the cornering applicant for the lands in conflict, and has held that the Department may lawfully and equitably grant him a lease, despite the contiguous owner's complaint about trespass. [Footnote omitted.] Furthermore, in cases where lands in conflict are urgently needed by one of two preference-right claimants but would confer only insignificant benefits upon the second who already has extensive holdings, the Department has said that there is no requirement under any statute or departmental policy which would warrant breaking up the former's long-established grazing operations and destroying his livelihood in order to bestow only comparatively minor benefits upon the second, whose legal rights were not superior but only equal. [Footnote omitted.]

From the exposition of the facts and the law given above, it is obvious that the Whites fall in the class of small stock operators owning even-numbered sections in a checkerboard area whose interests in Federal grazing leases the Secretary of the Interior called upon the Congress to protect by revision of the leasing system of 1934. It is obvious that by the revision of 1936 the Congress has placed the Whites as cornering applicants for section 15 leases upon an equal footing with contiguous applicants for the same lands, and that, the legal rights being equal, the Department must award the lands in accordance with the equities found. Here, there is no question but that the lands are essential to the maintenance of the Whites' operations and livelihood, but of only insignificant advantage to the Boslers, if indeed the latter still own the contiguous lands.

The offer of a 10-year lease to the Boslers was based on the theory that "the proper use to be made of the Government land is in connection with the contiguous deeded lands owned or controlled by Bosler." [Footnote omitted.] To hold thus would be to ignore the purpose and the effect of the 1936 revision of the leasing system, to disregard the equal rights of the Whites as cornering applicants, to give no weight to the equities involved, in particular the urgent need of the Whites for the lands, and to allow the possibility of trespass at the

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common section corners to affect the lease rights of both the cornering applicants and the Government itself with a limitation not contemplated by the Congress. In these circumstances, the offer of a 10-year lease to the Boslers should be withdrawn and the Whites' application for renewal of their lease for a period of 10 years from September 18, 1946, should be granted. (Pp. 277-280.)

This exposition of the legislative history of section 15 and of the problem it was intended to resolve makes it clear that a section 15 preference right based solely on cornering lands may be asserted by a lessee seeking renewal of a similar expiring lease. There is nothing in the legislative history or in the administration of section 15 to lead to the conclusion that it sought to protect cornering land owners for only the term of one lease. The problem was a continuing one and the reasoning which led to the grant of the initial preference right requires that it be recognized when the first lease expires.

The Bureau relied upon *Archie M. Dickey*, A-26305 (March 20, 1952), as holding that the superior preference right based on the exception clause in section 15 can be asserted only when the public land is first offered for lease. There, however, the public land had been offered for lease on July 31, 1937, under the departmental notice of that date, *supra*, and, so far as appears, had never been applied for by a preference applicant under the exception clause or any other. The Department held that the superior preference right expired on the 91st day after the lands were first offered and that only the other (contiguous) preference right could be asserted. The *Dickey* case, therefore, holds only that when land has been available for lease for more than 90 days without any one seeking a superior preference-right lease for it and the land remains continually available, then the superior performance right of cornering contiguous lands is lost. It does not hold that lessee who has held a section 15 lease from the time they first became available cannot rely upon the preference right of the exception clause for a renewal lease.²

² In this case section 12 became available for leasing sometime after July 21, 1937, when a homestead entry covering the section was recommended for cancellation. On September 7, 1937, Monte M. Moore, who had a homestead entry on section 14, applied for a lease on section 12. He was issued a 2-year lease effective October 25, 1938, as a preference right applicant under section 15. He applied for and received successive renewals of 5 and 10 years, respectively; there were no competing applicants for the land. In 1951 Moore assigned his lease to Clegg Livestock Company and apparently at that time conveyed section 14, which had been patented to him, to the Company. The company applied for and obtained a 10-year renewal on October 25, 1955, basing a preference upon its ownership of section 14. On January 24, 1956, the company conveyed section 14 to Lawrence G. Bugas and two days later assigned the grazing lease to him.

To so hold would, as the *White* case found, ignore the purpose and effect of the 1936 revision of the leasing system and destroy the protection which section 15, as amended, sought to afford those whose livelihood was based upon control of cornering land.³ The proper resolution here, as in the *White* case, is to treat the conflicting applicants as equal preference claimants and to award the land on the basis of the needs of the parties and proper management. *Jane M. Sandoz et al.*, 60 I.D. 63 (1947).

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4) (a); 24 F.R. 1348), the decision of the Chief, Office of Appeals and Hearings, is set aside and the case remanded for further proceedings consistent herewith.

EDWARD WEINBERG,
Deputy Solicitor.

APPEAL OF FARBER & PICKETT CONTRACTORS, INC.

IBCA-591-9-66 *Decided March 15, 1967*

Contracts: Construction and Operation: Payments—Contracts: Formation and Validity: Governing Law—Contracts: Disputes and Remedies: Damages: Measurement—Contracts: Disputes and Remedies: Jurisdiction

Under a contract for clearing logs and other debris from a creek, where the contractor was permitted to remove merchantable logs so cleared and to dispose of them for its own account, in lieu of burning as required by the contract, and where in addition the contractor cut and removed other merchantable standing or fallen trees outside of the work area, the Government was entitled by virtue of the contract provisions concerning the contractor's responsibility for property to deduct as a setoff from contract

³ There are, of course, many possible factual variations lying between this case where the applicant had at all possible times relied upon a preference right based on cornering land and the *Dickey* case in which such a preference right had not been asserted for a decade after it might first have been. In one, the *Swan* case, the Department indicated that a preference-right lease based on contiguous land might be shifted to one based on cornering land without prejudice. In *White* it held that a preference right first asserted on both contiguous and cornering land could survive on cornering land alone.

Whether a cornering preference right asserted unsuccessfully each time the land became available survives is another variation.

Without attempting to dispose of all the situations that may arise, we may offer as a guide the suggestion that the superior preference right may be asserted each time land becomes available for lease and is lost each time only when it is not asserted within a 90-day period.

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payments due to the contractor, treble damages pursuant to the applicable statutes of the State of Oregon with respect to the value of the illegally removed timber.

BOARD OF CONTRACT APPEALS

This is an appeal from the part of a decision of the contracting officer determining that the sum of \$7,695 should be withheld from final payment of \$10,997.60 to the appellant.¹ The contract was entered into in order to clear a stream known as Cherry Creek, located in Coos County, Oregon, so as to restore normal drainage, by removing logs and other debris that had accumulated therein, and constructing catch basins.² The appeal involves only the debris removal aspect of the contract. The amount the contracting officer has sought to withhold represents treble damages, as assessed by him, under Oregon Revised Statutes 105.810³ for timber trespass upon lands of the United States during the appellant's performance of the contract.

The contract required the appellant to pile and burn the debris that it collected.⁴ The contract contained no provision allowing the appellant to salvage and remove for its own account any merchantable logs which might otherwise be part of the debris to be burned. When the appellant was observed removing logs from the project site,

¹ Although the first paragraph of the notice of appeal (Exhibit No. 41) reads as if the appeal were taken from the entire decision of the contracting officer, appellant's subsequent specification of error relates only to the question of \$7,695. If, however, appellant intended to appeal from the remainder of the decision as well, as to those unspecified aspects appellant's claim is denied for failure of proof. Unsupported allegations (Exhibit Nos. 16, 33, 35), are not an acceptable substitute for proof. *American Ligurian Co.*, IBCA-492-4-65 (January 21, 1966), 73 I.D. 15, 66-1 BCA par. 5326. (All references are to the appeal file.)

² Exhibit No. 1.

³ "Treble damages for injury to or removal of produce, trees or shrubs. Except as provided in ORS 477.090, whenever any person, without lawful authority, willfully injures or severs from the land of another any produce thereof or cuts down, girdles or otherwise injures or carries off any tree, timber or shrub on the land of another person, or of the state, county, United States or any public corporation, or on the street or highway in front of any person's house, or in any village, town or city lot, or cultivated grounds, or on the common or public grounds of any village, town or city, or on the street or highway in front thereof, in an action by such person, village, town, city, the United States, state, county, or public corporation, against the person committing such trespasses if judgment is given for the plaintiff, it shall be given for treble the amount of damages claimed, or assessed for the trespass. In any such action, upon plaintiff's proof of his ownership of the premises and the commission by the defendant of any of the acts mentioned in this section, it is prima facie evidence that the acts were committed by the defendant willfully, intentionally and without plaintiff's consent." ORS 477.090 is inapplicable.

⁴ Specifications Applicable to Cherry Creek Drainage Restoration Project Disposal of Stream Debris, I, II, p. 3, Exhibit No. 1.

shortly after the work was commenced, the appellant was directed to cease such activity.⁵

Subsequently, appellant was advised by the contracting officer as follows:⁶

Mr. Welch [appellant's project manager] has * * * demanded that he be allowed to remove merchantable logs which he has pulled from debris piles and stacked. (The Coos Bay Office of the Bureau of Land Management had instructed Mr. Welch not to remove any merchantable logs from the area.) As the contract does not mention anything about merchantable logs, but does require that the contractor shall pile and burn all flammable debris over 3 inches in diameter and 3 feet long in and along the Cherry Creek stream channel * * * as shown on the plans and as staked on the ground * * * it is my decision, that the merchantable logs which were taken from the debris piles, can be removed by Mr. Welch or burned in accordance with the contract.

Thereafter, the appellant was observed on a number of occasions cutting trees in the project area and removing merchantable logs which, the Government ascertained, came from Government lands outside the project boundaries.⁷ The appellant was thereupon directed to cease such cutting and removal and was advised by the Government as follows:⁸

Reference is made to the letter of February 25, 1966, signed by Mr. Jack Hartman, Contracting Officer, regarding removal of merchantable logs from Cherry Creek. * * * That letter grants permission to remove merchantable material resulting from debris clearing within the clearing area and does not constitute authorization to remove any material originating from any green trees or from those portions of blowdown trees lying outside the clearing area.

The Government then made a stump cruise of the entire project area to determine the volume of merchantable timber which appellant removed. Within the general area of the project a total of 39 trees or stumps were inspected and 14 thereof were deemed unmerchantable.⁹ It was ascertained that a net volume of 78,175 (rounded off to 78,000) board feet in green and windthrown trees was removed by the appellant from within and outside the project site. Of this volume the Government excluded 21,000 board feet of salvage logs taken from

⁵ Instruction to Contractor, Exhibit No. 10 (on which appellant's agent's signature appears indicating receipt); Exhibit Nos. 11, 14, 15, 18, and 25.

⁶ Letter to appellant, dated February 25, 1966, Exhibit No. 21.

⁷ Memorandum dated March 1, 1966, Exhibit No. 22.

⁸ Letter to appellant, dated March 3, 1966, Exhibit No. 24.

⁹ Memorandum dated March 21, 1966, with attachments, Exhibit No. 28; contracting officer's Finding of Fact and Decision, Part II, par. 6, Exhibit No. 40.

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inside the project area and calculated that the appellant should pay it for 57,000 board feet,¹⁰ at \$45 per thousand board feet.

Since the trees were removed by the appellant from Government lands without the Government's permission, the contracting officer determined that the Oregon timber trespass statute, *supra*, providing for treble damages in the event of injury to or removal of trees willfully, intentionally and without the owner's consent, was applicable. Thus, \$7,695, the sum the contracting officer determined should be withheld was arrived at by trebling \$2,565, the value of the windthrown trees from outside and the green trees from inside the project which were removed by the appellant.¹¹

Although no objection has been raised concerning the Board's authority to decide this appeal, whenever a setoff is involved a question of jurisdiction presents itself.¹² The Board must look to the contract. It will not take jurisdiction of a setoff unless it has jurisdiction under the Disputes clause of the contract from which the setoff claim arose.¹³ If the right to setoff asserted is premised on an alleged debt arising independently of the contract, the matter is not within our cognizance.¹⁴ Here the provisions of the contract clearly spell out the appellant's liability for damage to the Government's property. The provision entitled "Protection of Property" reads: ¹⁵

The contractor shall not enter upon private property for any purpose without first obtaining permission from the owner of his duly authorized representative, shall be responsible for the preservation of all public and private property along and adjacent to work contemplated under the contract, and shall use every precaution necessary to prevent damage or injury thereto. He shall exercise due care in preventing, and shall be responsible for damages to structures of all kinds, whether owned by the Government or privately, and shall protect from disturbance or damage all land monuments until they have

¹⁰ Contracting officer's Finding of Fact, *supra*, note 9, par. 10.

¹¹ *Ibid.* The term "timber" includes down and dead trees as well as growing trees. Falk, *Timber and Forest Products Law* 75 (1958).

¹² Compare *A. L. Dougherty Overseas, Inc.*, ASBCA No. 11163 (March 24, 1966), 66-1 BCA par. 5478, with *Houster-Fearless Corp. Westwood Division*) ASBCA No. 9160 (March 23, 1964), 1964 BCA par. 4159.

¹³ *Noria General Contractors Corp.*, ASBCA No. 6497 (October 12, 1961), 61-2 BCA par. 3183; *L. R. Sommer*, ASBCA No. 5065 (December 31, 1958), 58-2 BCA par. 2043; 59-2 BCA par. 2417 (November 30, 1959).

¹⁴ *A. L. Dougherty*, *supra*, note 12; *Skidmore Owings & Merrill*, ASBCA Nos. 5964 and 6802 (September 12, 1962), 1962 BCA par. 3518; *Sound Ship Building Corp.*, ASBCA No. 4939 (April 21, 1959), 59-1 BCA par. 2178; *Delta Tank Manufacturing Company, Inc.*, ASBCA No. 3699 (June 28, 1957), 57-1 BCA par. 1341.

¹⁵ General Conditions Applicable to Cherry Creek Drainage Restoration Project, par. 17, p. 7, Exhibit No. 1.

been properly referenced by the Engineer.

The contract also provides as follows:¹⁶

The Contractor shall * * * be responsible for complying with any applicable * * * State * * * laws, codes, and regulations, in connection with the prosecution of the work. He shall be similarly responsible for all damages to persons or property that occur as a result of his fault or negligence. * * *

In undertaking to be "responsible" for damage to property, the appellant has made itself "liable, legally accountable, and answerable" therefor¹⁷ within the purview of the contract. Thus, the determination, assessment, and withholding by the contracting officer were made not outside the contract but on the basis of contractual authority. This appeal therefore presents a dispute concerning questions of fact arising under the contract within the contemplation of the Disputes clause, with respect to which this Board has jurisdiction.¹⁸

The appellant has not denied that it removed the timber. Neither has it disputed the amount of timber the Government claims was removed. Rather, appellant maintains "that whatever timber was removed was by the terms of the contract the property of the contractor to dispose of in any manner that it saw fit, whether by salvage or otherwise."¹⁹

If the appellant removed only timber that it had collected in the actual course of clearing the stream of debris, we would agree that it could "dispose of it in any manner that it saw fit." There is perhaps implicit in the obligation to burn the option to remove in lieu thereof. In any event the Government expressly granted the appellant the right to remove merchantable logs taken from debris piles.

The appellant, however, did not limit itself to removing logs gathered from within the project area. The evidence is ample that it removed, as well, green trees from within the area of work and windthrown logs from outside the project site. The "terms of the contract" clearly do not, contrary to its assertion, authorize the appellant to do so.²⁰ Furthermore, the Government had ordered it not to remove such green trees and windthrown logs. Whatever right

¹⁶ Standard Form 23-A (June 1964 Edition), Article 12, "Permits and Responsibilities," Exhibit No. 1.

¹⁷ 37A Words and Phrases (Supp. 1966) 7 Black, Law Dictionary (3d ed. 1933), 1547.

¹⁸ *L. R. Sommer, supra* note 13, in which the contractual provisions relied upon by the contracting officer when he withheld contractor's monies were similar to those cited here.

¹⁹ Notice of Appeal, Exhibit No. 41.

²⁰ The appellant appears to have abandoned the position it took earlier in the course of this dispute that it was directed by the Government inspector to cut merchantable trees. Appellant's letter to contracting officer, dated May 20, 1966, Exhibit No. 38. This contention was considered and rejected by the contracting officer in his Finding of Fact and Decision, Part II, par. 9, Exhibit 40.

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the appellant had to remove merchantable logs from the debris did not extend over to green trees and "windthrows." Its conduct constituted a violation of its contractual responsibility to preserve the property along and adjacent to the area where the work was being performed.

The appellant has not attacked the authority of the contracting officer to apply the provisions of the treble damages statute²¹ against it, nor do we. Under the circumstances of this case the contracting officer was merely performing an administrative function authorized by the contract²² utilizing an explicit statutory formula.²³

Neither has the appellant questioned the valuation placed upon the timber by the contracting officer of \$45 per thousand board feet. In our view such valuation is reasonable. Nor is the method used by the contracting officer in assessing the treble damages improper.²⁴ Rather, the appellant contends, "The responsibility, if any, of Farber & Pickett would be on a single stumpage basis rather than treble."²⁵

The Oregon law, however, is to the contrary.²⁶ Once proof of ownership on the part of the injured party and the commission by the alleged trespasser of any of the acts mentioned therein, viz., cutting down, injuring or carrying off any tree or timber, are shown, he is prima facie liable for treble damages under the statute.²⁷ The Government's ownership is unquestioned. The appellant's conduct is undisputed. The appellant has not overcome the statutory presumption against it.

The appellant has not furnished any proof that would either negate its contractual "responsibility" for failure to preserve the Government's property or mitigate the amount of damages assessed. A

²¹ ORS 105.810, *supra* note 3.

²² In *Paul C. Helmick Co.*, IBCA-39 (Supp.) (August 21, 1958), 65 I.D. 355, 58-2 BCA par. 1887, this Board upheld a determination by the contracting officer that the contractor was obligated to pay the Government the sum of \$10,232.55 representing the cost of suppressing a forest fire and the value of the National Forest resources that were lost. In *L. R. Sommer*, *supra* note 13, the contracting officer withheld \$17,499.10 from the contractor for causing a Government tower to collapse. The Board reduced the damages assessed by the contracting officer to \$8,560.60.

²³ We note that ORS 105.810 was brought to the attention of the appellant as early as February 11, 1966, well before most of the acts of trespass complained of Exhibit 19.

²⁴ *United States v. Firchau*, 380 P. 2d 800 (Ore. 1963).

²⁵ Notice of Appeal, Exhibit No. 41.

²⁶ Falk, *supra* note 11, at 61, stating "double stumpage value * * * with a few exceptions * * * is the minimum cost of a trespass in Oregon."

²⁷ ORS 105.810, *supra* note 3.

trespass is not excused by a mistake of law or of fact.²⁸ The appellant was clearly not an innocent trespasser, in which case it would be liable only for double damages.²⁹ The evidence is strong and unrefuted that the appellant did not act through a reasonable misapprehension. It has not presented any proof that it had good reason to believe that it could lawfully remove the timber. On the contrary, it continued to remove the timber after having been warned not to.³⁰

We find that the contracting officer was justified in determining that the appellant's removal of the timber constituted a failure to preserve Government property for which it was responsible under the contract. We further find that such acts constituted a trespass under Oregon law. Finally, we find that the contracting officer was empowered to ascertain the extent of the appellant's legal responsibility to the Government therefor through the application of the Oregon treble damages statute.

Accordingly, the amount withheld from final payment is appropriate.

Conclusion

The appeal is denied.

THOMAS M. DURSTON, *Deputy Chairman*.

I CONCUR:

DEAN F. RATZMAN, *Chairman*.

ATLAS CORPORATION

A-30617

A-30677

Decided March 17, 1967

Phosphate Leases and Permits: Permits

An application for a phosphate prospecting permit is properly rejected when information is available from which the existence and workability of the phosphate deposits in the land applied for can be determined; it is not necessary that the information specifically describe the phosphate deposits within the land applied for, where detailed information is available regarding the existence of a workable deposit in adjacent lands and geologic and other surrounding external conditions, from which the workability of the deposits in the subject lands can be reasonably inferred.

²⁸ *Gordon Creek Tree Farms, Inc. v. Layne*, 368 P. 2d 737 (Ore. 1962).

²⁹ ORS 105.815.

³⁰ In *Fisher v. Carlin*, 346 P. 2d 641 (Ore. 1959), where an assessment of treble damages was upheld, the defendant had been clearly notified not to cut plaintiff's trees.

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APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Atlas Corporation has appealed to the Secretary of the Interior from decisions dated March 11 and May 9, 1966, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed decisions of the Idaho land office rejecting in part its applications Idaho 016243, 016246, 016247, and 016248,¹ filed for phosphate prospecting permits on certain lands in sec. 13, T. 6 S., R. 40 E.; secs. 18 and 19, T. 6 S., R. 41 E.; secs. 14, 22, 23, 26, and 35, T. 7 S., R. 42 E.; secs. 17, 20, 21, 23, 24, and 28, T. 7 S., R. 44 E.; secs. 27 and 34, T. 8 S., R. 45 E.; and secs. 3, 10, 15, and 22, T. 9 S., R. 45 E.; Boise Meridian, Idaho, under the provisions of section 9(b) of the Mineral Leasing Act, as added by the act of March 18, 1960, 74 Stat. 7, 30 U.S.C. § 211(b) (1964).

Since the enactment of the Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended, 30 U.S.C. § 181 *et seq.* (1964), the Secretary of the Interior has had the authority to lease phosphate deposits of the United States. In 1960 the Secretary was granted the additional authority to issue prospecting permits where prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in any unclaimed, undeveloped area. The authority to issue phosphate leases is set out in section 9(a) of the Mineral Leasing Act, as amended, 62 Stat. 290, 30 U.S.C. § 211(a) (1964), essentially as originally enacted, which provides:

The Secretary of the Interior is authorized to lease to any applicant qualified under this Act, through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, any phosphate deposits of the United States, and lands containing such deposits, including associated and related materials, when in his judgment the public interest will be best served thereby. * * *

The authority of the Secretary to issue prospecting permits was added to section 9 of the Mineral Leasing Act by the act of March 18, 1960, *supra*, which in pertinent part provides:²

(b) Where prospecting or exploratory work is necessary to determine the existence or workability of phosphate deposits in any unclaimed, undeveloped area, the Secretary of the Interior is authorized to issue * * * a prospecting permit

¹ The first offer is involved in appeal A-30617 from the decision dated March 11, 1966. The remaining three offers are involved in appeal A-30677 from the decision of May 9, 1966.

² The pertinent language is identical with that governing the issuance of coal prospecting permits as set out in the Mineral Leasing Act as originally enacted (section 2, act of February 25, 1920, 41 Stat. 438) and as it now reads (section 1, act of June 3, 1948, 62 Stat. 289, as amended, 30 U.S.C. § 201(b) (1964)).

which shall give the exclusive right to prospect for phosphate deposits, including associated minerals * * * ; and if prior to the expiration of the permit the permittee shows to the Secretary that valuable deposits of phosphate have been discovered within the area covered by his permit, the permittee shall be entitled to a lease for any or all of the land embraced in the prospecting permit.

Each of the applications in question was rejected in part by the land office upon the basis of reports of the Geological Survey which recommended, *inter alia*, the rejection of certain lands classified as underlain by workable phosphate deposits, and, as such, subject to the leasing provision of section 9(a) of the act, *supra*.

Each of the decisions was appealed to the Director, Bureau of Land Management, with respect to the determinations of the Geological Survey that the lands were underlain by workable phosphate deposits. In its appeals Atlas set forth lengthy discussions of geological information known to it, primarily based upon Geological Survey publications, relating to each of the subject areas. In addition, it discussed the pertinent law and regulations. Upon this basis, Atlas contended that the Geological Survey had "insufficient evidence to classify any phosphatic shales which may exist on the Subject Land as being workable and that the Subject Lands should, therefore, be subject to the statutory provisions authorizing the issuance of phosphate prospecting permits."

In order to fully evaluate the validity of the technical arguments made in the appeals, the Office of Appeals and Hearings requested the Geological Survey to review each of the applications in question and prepare supplemental reports and recommendations. Upon the basis of the supplemental reports, which were incorporated in the decisions of March 11 and May 9, 1966, the Office of Appeals and Hearings, in affirming the decisions of the land office, concluded that Atlas had not clearly shown that the determinations of the Geological Survey were improperly made, and, in the absence of such a showing, held that the determinations would not be disturbed.

The decisions were appealed to the Secretary of the Interior. In both appeals the contentions of the appellant are virtually identical and are essentially the same as those made to the Bureau. In the present appeals Atlas sets forth three separate arguments: the determination of the Geological Survey that subject lands are underlain by workable phosphate deposits is improper because the determination is (1) unsupported by the facts known to Atlas and to the Geological Survey, (2) contrary to the intent of the law and regulations, and (3) inconsis-

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tent with the Geological Survey's application of the law and regulations in other cases. However, the arguments are related, for Atlas relies upon the same basic contention in their development—that a determination of workability cannot be based solely upon geological inference, at least not in these cases.

In the present appeals, as it did in the appeals below, Atlas sets forth lengthy discussions of geologic information relating to each of the subject areas, based primarily upon Geological Survey publications. Atlas points out that none of the geologic information in the publications specifically describes the subject lands, and that, with one exception, the information reveals that there are no outcrops of phosphatic shales on the subject lands. However, Atlas expressly states that "there is no material dispute as to the facts in this case" and agrees with the Geological Survey that the existence of phosphate deposits underlying the subject lands can be inferred from the geologic information. Atlas concludes, in general, that since it has shown that the existence of phosphate deposits underlying the subject lands is merely inferred from the geologic information, none of which specifically describes the deposits in the subject lands, there is not sufficient information upon which the Geological Survey can determine the workability of the phosphate deposits underlying the subject lands. In effect, Atlas contends that a determination of workability cannot be based upon geological inference alone, but must be based upon what it terms "actual knowledge," *i.e.*, geologic information specifically describing the deposit in each of the tracts of the lands applied for resulting from an actual physical examination of the deposit in the land by means of drilling or exploratory work on the ground.

It is clear that Atlas has no dispute with the geologic facts in these cases. Rather, in contending that a determination of workability cannot be based upon geological inference, Atlas challenges the standard that the Geological Survey applies in determining whether lands are subject to the leasing rather than prospecting provisions of the Mineral Leasing Act, *supra*. In each of the arguments outlined above, in developing its contention that "actual knowledge" is required to determine the workability of a phosphate deposit, Atlas relies upon, to a greater or lesser extent, an interpretation or application of the general mining laws, the permit statute, its legislative history, and the pertinent regulations. In addition, Atlas attempts to strengthen its case by citing occasions when prospecting permits have been granted where

the inference of workability was allegedly as strong or stronger than that in the present cases.

A careful examination of each of the bases upon which Atlas relies in developing its contention that a determination of workability cannot be based upon geological inference, which are scattered throughout each of the three principal arguments, discloses nothing to support placing such a limited construction upon the standard from which the Geological Survey establishes workability. Only a brief discussion of each basis is necessary to reveal its inaccuracy, inapplicability, or lack of merit.

First, the construction which Atlas places upon the language of the statute, its legislative history, including testimony at congressional hearings subsequent to the enactment of the permit statute, as well as the pertinent regulations, is a result of its playing on words. In its discussion of these matters Atlas attempts to develop its contention through the interchangeable use of such terms as "not known" or "no known facts" or "actual knowledge" with "workability can[not] be established by inference." For example, in initially discussing the permit statute, Atlas states that the "clear intent of the statute is if either the existence or workability of such deposits on a *particular piece* of property is *not known*, * * * a prospecting permit should be issued * * *." [Italics added.] Essentially, this is accurate, but such language, in itself, does not preclude the possibility of establishing workability through geological inference. The construction of the statute proposed by Atlas is clearly untenable.

Second, in discussing the regulations, Atlas points out that the standard used by the Geological Survey in determining whether lands are subject to leasing is inconsistent with the standard applicable to a permittee in establishing his preference right to a lease. The statute requires that the permittee show a valuable deposit has been discovered, and the regulations promulgated thereunder, which Atlas attempts to apply to the Geological Survey, set forth a standard of proof clearly limited to those circumstances. Finally Atlas attempts to apply geological inference as it relates to the concept of discovery under the general mining laws to the present circumstances. The general mining laws have had no application to the leasing of phosphate deposits since the enactment of the Mineral Leasing Act, *supra*.

The fallacy common to these analogies is that geological inference cannot be used to establish that valuable deposits have been discovered

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within the area covered by a prospecting permit or to establish a discovery under the mining laws. In each case the permittee or claimant must show the physical existence of the deposit within the limits of the permit or claim and demonstrate that it is valuable, *i.e.*, that the extraction is economically feasible or that the deposit warrants a prudent man in the further expenditure of time and labor with the reasonable expectation of developing a valuable mine. There is nothing in the legislative history quoted by the appellant to justify a conclusion that the Department was intending to abandon the use of geological and other surrounding and external conditions to help it decide whether a lease or prospecting permit should issue.

Thus, it is clear that neither the general mining laws, the permit statute, its legislative history, nor the pertinent regulations can be properly relied upon to establish the contention of the appellant that a determination of workability cannot be based upon geological inference. As this is the foundation upon which the three principal arguments of Atlas are based, they too must fail.

Nevertheless, it is advisable to examine in greater detail the arguments set forth by Atlas directly challenging the standard applied by the Geological Survey. Atlas states:

The Geological Survey in its [four] supplemental reports bases its determination that workable deposits exist on the Subject Lands on the following reasons reported in the conclusions of those reports:

- (i) Proximity to existing competitive leases and active mining operations;
- (ii) Association with existing competitive leases and active mining operations;
- (iii) Portions of the lands were previously classified for leasing;
- (iv) Lack of evidence to refute the leasing determination;
- (v) Sample trenches in the immediate vicinity.

It is submitted that each of the conclusions are specious and irrelevant. The Appellant has clearly shown that the determination was improperly made. Notwithstanding [the above reasons] * * *, Appellant has clearly demonstrated that the existence of workable deposits cannot be shown. The Geological Survey has resorted to immaterial reasons to emasculate the permitting provisions of the Mineral Leasing Act to openly flaunt the clear intent of Congress to issue permits when workability is not known and to apply the leasing provisions on land where no mining operation could conceivably be commenced without extensive physical exploration on the ground.

The Geological Survey based its determination on known geology outside of the Subject Lands and projections on to the Subject Lands. The determination is based upon geological inference. The determination is not based in any way on *actual* knowledge or *actual* discovery of a valuable workable phosphate deposit on the Subject Lands.

* * * * *

* * * The mere presence of phosphatic shales in surface outcrops on neighboring lands or inferred subsurface presence cannot constitute in and of itself sufficient evidence to classify phosphatic shales as occurring in valuable workable deposits as contemplated by the Mineral Leasing Act, *supra*.

What is the standard intended by the Congress? Since the Congress was well aware of the derivation of the language of the phosphate prospecting permit statute (S. Rep. No. 879, 86th Cong., 1st Sess., p. 2 (1959)), *i.e.*, the language of the coal prospecting permit statute as set out in the Mineral Leasing Act as originally enacted,³ it becomes important to examine how the coal statute has been construed in the course of the 40 years intervening between the earlier coal act and the later phosphate one.

Shortly after the Mineral Leasing Act was enacted, in *Emmett K. Olson*, 48 L.D. 29 (1921), the Department considered an appeal involving the rejection of an application for a coal prospecting permit on the ground that a lease was the proper method of disposition under the act. The Department, in affirming the rejection of the application for a prospecting permit, considered relevant some of the same factors against which Atlas now protests in the present appeal—that is, proximity to an operating mine, a mine operator's opinion that the land is leasable, location of the land in a known coal field, and the character of coal beds in adjacent lands. The pertinent evidence was summarized in the decision as follows:

On November 24, 1920, the Geological Survey reported to the Commissioner of the General Land Office that the lands lie in the well known Book Cliffs coal field of north-central Utah; that the Cameron Coal Company has an operating mine in Sec. 35 in which the existence and workability of at least two beds of coal about six feet in thickness and lying at moderate depths have been completely demonstrated; that the coal is of a high quality bituminous for which there is a ready market; that other large mines exist within one or two miles of said lands; that the fact that the Cameron Coal Company, owner of a going mine on adjacent lands, considers the presence, character, and quality of the coal in the lands in question sufficient to justify it to apply to have them defined as a leasing block and offered for lease, without additional prospecting, seems to establish convincing evidence that prospecting operations are not necessary to prove the existence and workability of coal of commercial value. It was recommended that a prospecting permit be denied and that the lands be offered for lease. 48 L.D. at 30.

³ It is noted that the character of phosphate deposits, which occur with great uniformity of thickness and consistency of quality throughout wide areas, is most similar to coal deposits.

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After quoting the language of the coal permit statute, the Department concluded:

Under this section the Secretary of the Interior issues permits to prospect unclaimed, undeveloped lands where prospecting or exploratory work is necessary to determine the existence or workability of the coal deposits.

Primarily the Secretary of the Interior must determine whether or not exploration is first necessary to ascertain whether a tract of public coal land should be placed within a leasing unit. If he becomes satisfied from the evidence within his possession that exploration is unnecessary, it is within his discretionary authority to proclaim the land subject to lease in the first instance. * * *. 48 L.D. at 31, 32.

The *Olson*, case, *supra*, while not citing any earlier cases, was a logical application of the prior law governing the disposal of coal. However, in the following year, the pertinent rules and decisions previously applied by the Department in determining whether lands are valuable for coal were discussed at length in *State of Utah, Pleasant Valley Coal Company, Intervenor v. Braffet*, 49 L.D. 212 (1922),⁴ as follows:

The evidence in the case shows that there are no exposures or outcrops of valuable coal on the land, and it is, therefore, vigorously contended that under the rules, regulations, and decisions as formerly promulgated and applied by the Department, it must be held to have been noncoal in character on the decisive date. * * *.

In the instructions of October 26, 1905, the Department discussed its previous decisions and those of the courts, finding that there was nothing in the decisions of the Supreme Court to warrant the construction that evidence exclusively of the mineral character of lands adjoining or surrounding a particular tract in controversy is incompetent to establish the like character of the latter, and held that in determining whether a tract of public land contains coal deposits, whatever is relevant and bears in any degree on the question is admissible in evidence; that the characteristics peculiar to such deposits are to be kept in view and that the presence of such deposits may be determined upon authenticated evidence of conditions which constitute a sufficient guide of the geologist or coal expert.

Subsequently the same question arose in the *Diamond Coal and Coke Company v. United States* [233 U.S. 236 1914], and the decision of the Supreme Court, in harmony with the rule established by the Department, is expressed with such clarity and emphasis as to leave no doubt of its meaning. * * *. 49 L.D. at 215, 216.

* * * * *

The Department is of opinion that in this case the law as construed in *Diamond Coal and Coke Co. v. United States*, must be followed; that in order to except

⁴ Sustained in *Work v. Braffet*, 276 U.S. 560 (1928).

lands from the grant to the State it must appear that at the date the grant presumptively attached the known conditions were such as to engender the belief that the land contained coal of such quality and in such quantity as would render its extraction profitable and justify expenditures to that end; that the character of the lands may be deduced from evidence of adjacent disclosures and other surrounding or external conditions and that proof of their character is not limited to actual discoveries within their boundaries. 49 L.D. at 218.

Over the years the Department has applied the same or similar criteria to the adjudication of applications for coal prospecting permits, *John Smalley*, A-24166 (August 15, 1947)—bed of commercial coal on adjacent land, coal bed inferred to pass under land applied for; *Cavanal Coal Company*, A-27034 (December 20, 1954); *Morris Kline*, A-27651 (October 29, 1958); *Claude P. Heiner*, 70 I.D. 149 (1963). The same standard determines whether leases or permits are to be issued for sodium minerals, *C. A. Romano*, A-27003 (December 3, 1954), and for potassium, *Charles W. Hicks*, A-27130 (June 6, 1955), under statutes authorizing the issuance only of leases and not permits, if the land is known to contain valuable deposits of sodium or potassium minerals. Section 24 of the Mineral Leasing Act, as amended, 45 Stat. 1019, 30 U.S.C. §§ 261, 262 (1964); section 3, act of February 7, 1927, as amended, 62 Stat. 292, 30 U.S.C. § 283 (1964).

After enactment of the phosphate permit statute, the same criteria have been considered in determining whether phosphate prospecting permits or leases are to be issued. The Department has consistently held that the Secretary is without authority to issue a prospecting permit for more detailed exploration on land where phosphate deposits are known to exist in workable quantity and that it is not necessary, in order to sustain a finding that such deposits do exist in workable quantity, that a determination can be made with some degree of assurance that a mining operation will be an economic success. Rather, it is enough that the available data is sufficient to determine that the lands under consideration would require only limited prospecting to project a program for development but would not require prospecting for the purpose of determining the presence or workability of the deposit. *John D. Archer, Elizabeth B. Archer*, A-29974 (June 16, 1964); *Elizabeth B. Archer*, A-30024 (June 17, 1964); *Elizabeth B. Archer*, A-30220 (January 14, 1965); *William J. Colman*, A-30516 (November 4, 1966).

This long continued administrative and judicial interpretation, and its recognition by Congress, is persuasive that competent evidence to

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establish the fact that land contains valuable deposits of certain minerals, that it is known to be valuable for minerals, that it contains commercially valuable deposits of minerals, or that exploration is not necessary to determine the existence or workability of a coal or phosphate deposit, may consist of proof of the existence of the minerals in adjacent lands and of geological and other surrounding and external conditions. On the other hand, it is not necessary, as Atlas insists, to demonstrate the workability of the mineral deposit from an actual physical examination of the deposit in the land applied for by means of drilling or actual exploratory work on the ground.

In view of the foregoing, wherein the propriety of the standard applied by the Geological Survey in determining whether the lands in question are subject to the leasing provisions of section 9(a) of the act, *supra*, is clearly established, we have reviewed the contention of the appellant that the determination of the Geological Survey is unsupported by the facts known to Atlas and to the Geological Survey. As previously noted, Atlas expressly states that it has no dispute with the facts in these cases, and since the facts set forth in the present appeals are essentially the same as those set forth below, we believe that a further review of the cases by the Geological Survey is unnecessary.

Consequently, the supplemental reports of the Geological Survey, which were included in the body of the decisions of the Bureau, have been examined in light of the allegations set forth by Atlas, and I find that, in view of the character of the adjacent lands, particularly the fact that the workability of deposits in close proximity has been conclusively established by means of sample trenches and existing mining operations, the information is sufficient to justify the determination made by the Geological Survey that the lands in question are underlain by workable phosphate deposits. Accordingly, since competent evidence clearly supports a conclusion that prospecting or exploratory work is not necessary to determine the existence or workability of phosphate deposits in the lands applied for, the applications for prospecting permits were properly rejected in part.

Therefore, the decisions appealed from are affirmed.

HARRY R. ANDERSON,
Assistant Secretary of the Interior.

APPEAL OF L. B. SAMFORD, INC.**IBCA-523-10-65***Decided March 23, 1967***Contracts: Construction and Operation: Changed Conditions—Contracts: Construction and Operation: Notices—Contracts: Disputes and Remedies: Equitable Adjustments—Contracts: Disputes and Remedies: Burden of Proof**

Under a contract providing for extra compensation for excavation of rock, which contained definitions of solid rock, ledges, and boulders, where the contractor encountered a changed condition consisting of many boulders of sizes exceeding those represented by the contract, the contractor is not entitled to an equitable adjustment on the basis that such boulders constituted solid rock, in the absence of timely notice to the contracting officer of the condition so that appropriate corrective measures could be considered; and in absence of a preponderance of evidence supporting the contractor's claim, the equitable adjustment allowed by the contracting officer's findings with respect to the volumes of boulders excavated will be affirmed and the appeal denied.

Contracts: Formation and Validity: Authority to Make—Contracts: Performance or Default: Inspection

An informal agreement between the contractor and a Government inspector in substance that excavation at three pond sites of all boulders and other smaller material should be billed as one hundred percent solid rock, did not bind the Government because of the inspector's lack of authority, and was properly rejected by the contracting officer.

Contracts: Construction and Operation: Drawings and Specifications—Contracts: Disputes and Remedies: Equitable Adjustments

A contractor is not entitled to an equitable adjustment under a claim of extra work for installing concrete ballast pads on top of underground tanks where the drawings clearly require such ballast pads to be included as part of the installation of the tanks, and such ballast pads are not referred to in any other separate pay item for concrete work, such as claimed by the contractor with respect to thrust blocks, anchor blocks, bearing pads and outfall pads.

BOARD OF CONTRACT APPEALS

The appellant contends that the contracting officer's authorized payment for excavation work required in the construction of three concrete ponds is insufficient (Claim No. 1), and that he erred in refusing to make separate payment for concrete placed over three underground propane storage tanks (Claim No. 3). Because the contracting officer had not made a final appealable decision respecting

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Claim No. 2 (additional grading), the Board issued an order on February 15, 1967, requiring the issuance of such a decision on or before March 10, 1967; therefore, Claim No. 2 will not be considered in this opinion.

The Contract (Claim No. 1)

L. B. Samford, Inc., undertook, under standard construction contract forms, to construct a hatchery building, several associated buildings, two residences, nine rearing or nursery ponds, and many other facilities at the Greers Ferry National Fish Hatchery, Heber Springs, Arkansas. The appellant's total bid for 60 items listed in the bidding schedule was \$473,532. Item No. 47 was for one concrete nursery pond at \$15,000. Item No. 48 was for eight concrete rearing ponds at \$13,000 each. In fact, two nursery ponds and only seven rearing ponds were constructed at the site.

Section 5, Structural Excavation, of the Technical Specifications, provided in part:

5-01. *STRUCTURAL EXCAVATION* shall include the removal of all materials of whatever nature necessary for construction of concrete foundations and substructures; * * * and structures; all in accordance with the drawings and as staked.

5-01.1 It shall include * * * the removal of all surplus excavated material, and the placement of all necessary backfill as hereinafter specified.

* * * * *

5-11. *MEASUREMENT AND PAYMENTS*

5-11.1 *NO PAYMENT* will be made for *STRUCTURAL EXCAVATION* as a separate payment item, except that if rock is encountered in *STRUCTURAL EXCAVATION* then payment will be made for Rock as set out in Section 6 "ROCK EXCAVATION," otherwise all costs for labor, materials, equipment, and transportation for performing *STRUCTURAL EXCAVATION WORK* will be included in the Lump Sum or Unit Price, as bid for the applicable Building, Structure or other item of work.

Part of Section 6 of the Technical Specifications is as follows:

6-01. *ROCK EXCAVATION* is defined as the removal of solid rock, ledges, and boulders having a volume greater than one-half ($\frac{1}{2}$) cubic yard, which cannot be removed by the proper use of power equipment or which requires the continuous use of explosives.

* * * * *

6-05. SHOULD ROCK BE ENCOUNTERED IN GRADING, STRUCTURAL EXCAVATION, OR EXCAVATING, EXTRA PAYMENT WILL BE MADE.

6-06. **IMPORTANT.** THE CONTRACTOR IS HEREWITH PUT ON NOTICE THAT A MAJOR PORTION OF THE CONSTRUCTION AREA CONTAINS BOULDERS, UP TO AND INCLUDING ONE AND ONE-HALF (1½) CUBIC YARDS.

Section 62 of the Technical Specifications established the following measurement and payment guidelines:

62-01.1a **MEASUREMENT** for payment purposes for ROCK EXCAVATION will be made of the **ACTUAL VOLUME** of Rock removed to a **DEPTH NOT EXCEEDING SIX (6) INCHES** below the design grade elevations as shown on the drawings and as staked.

* * * * *

62-01.1d **VOLUME** to be determined by the **AVERAGE END AREA METHOD** based on ground elevations taken at the time rock is uncovered and the design and the design elevations as shown on the drawings and as staked, plus allowances as set out above.

* * * * *

62-01.2a **PAYMENT** for ROCK EXCAVATION will be made at the rate of **TWENTY DOLLARS (\$20.00) PER CUBIC YARD**, which price shall cover all costs for labor, materials, equipment, and transportation for **REMOVAL AND DISPOSAL**, complete for acceptance.

The Facts (Claim No. 1)

In a claim document dated November 24, 1964 (part of the appeal file), the appellant asked to be paid for 3028.30 cubic yards of rock excavation rather than 1191.00 cubic yards which had been paid for by the Government¹ and gave the following information:

The site investigation made by the Contractor prior to bidding indicated that the site at which the ponds would be installed was filled ground. However, there was nothing to indicate that the area was a spoil area for the rock excavated from [a dam]. * * *

The specifications did state that a major portion of the construction area contained boulders up to and including one and one half cubic yards. Some boulders meeting the "rock excavation" test because they were larger than one-half cubic yard were encountered in the excavation of Pond No. 1 through Pond No. 6. The claim document lists those rock quantities:

Pond No. 1	22.00 c.y.
Pond No. 2	17.00 c.y.
Pond No. 3	6.00 c.y.
Pond No. 4	19.00 c.y.
Pond No. 5	14.00 c.y.
Pond No. 6	24.00 c.y.

¹ These quantities were computed as of September 20, 1964.

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The appellant asserts that in Pond Nos. 7, 8, and 9 it found "closely packed" rocks and boulders and that the "whole area was replete with boulders which exceeded $1\frac{1}{2}$ cubic yards in volume and could not be removed with the proper use of the power equipment which had been used to excavate ponds 1 through 6." The claim document continues with the allegation that it was necessary "to resort to the continuous use of explosives" to reduce the boulders exceeding one and one-half cubic yards to sizes that could be handled with the equipment available at the job site. A further explanation was included in the claim document:

This claim does not intend to indicate that all the rocks and boulders in the area in question exceeded $1\frac{1}{2}$ cubic yards in volume. As a matter of fact, there were undoubtedly rocks of all sizes and shapes lying between the very large boulders but it was impossible to remove any of the material without continuous blasting due to the interference of those very large boulders.

The appellant's counsel in his opening statement at the hearing on this appeal, summed up the theory on which the claim is made:

* * * it is admitted by the contractor, that these boulders were not measured as to their volume, but that because of the direction of the Government's representative it was made impossible to measure them, because it was agreed that they would be broken up by explosives in their position and where they were located, and that being the case, and I think this is the real nub of this whole matter * * * it was impossible to measure them. *That constitutes a change or an amendment to or a digression from these specifications* which was agreed by the Government and the material had to be removed by the continuous use of explosives, which I think is admitted. * * * [Italics added.]

The appellant's general construction superintendent gave un rebutted testimony that he and the Government inspector assigned to the project had reached an understanding² that the total volume of excavation for Pond Nos. 7, 8, and 9 would be paid for at the "rock" price (\$20 per cubic yard). The inspector "was removed"³ during the project work, was not employed by the Government at the time of the hearing and did not testify. The contracting officer assigned as the reason for the inspector's dismissal,⁴ the "way that he administered the contract in general."

The following account of the removal of material from Pond Nos.

² Section 18 of the contract's "General Conditions" states: "Inspectors are not authorized to waive or alter in any respect any of the terms or requirements of the contract * * *."

³ Tr. 142.

⁴ Tr. 177.

7, 8, and 9 was given by the appellant's general superintendent (Tr. 25-26) :

* * * he stripped the over-burden off, pushed it in a southwardly direction, and at this time we had the rippers installed on the HD-11, and all they would do is just ride right over the rock foundation. * * * There was approximately a hundred and ten [holes drilled for dynamite charges] in this particular area, being somewhere in the neighborhood of 20 feet wide and 204 feet long.

* * * Well, once we had shot the first area off and removed it by a method of pushing and also ripping, we encountered the same thing. We had the heads of the rock back up visual and we had removed certain varying depths on the first passage of the continuous blasting. We no longer tried to make an attempt to field measure as such in these areas. * * *

The general superintendent also stated (Tr. 26-27) that the Government's inspector was satisfied "at the time" with the appellant's method of measurement (cross-sectioning).

The contracting officer refused to approve the appellant's original billing for Pond Nos. 7, 8, and 9 as 100 percent rock excavation, stating in his findings of September 17, 1965 (page 3), that "the contractor has been paid as rock excavation 35 percent of *all* excavation for Pond Nos. 7, 8, and 9, the related access drives, and the adjacent main roadway; the amount of 988.7 cubic yards * * *." On page 4 of the findings he added the following conclusion :

Simply because a boulder is encountered during the prosecution of the work does not reclassify the surrounding structural excavation material as rock excavation.

The appellant correctly asserts that the contracting officer's testimony,⁵ respecting his determination that 35 percent of the excavated material was rock, is lacking in corroborative evidence contained in the appeal file. In addition, the Government's Regional Engineer, although he testified,⁶ did not deny the allegation of the appellant's general superintendent that he (the Regional Engineer) "told me to bill the rock one hundred percent." The Regional Engineer, however, did not see the material removed by appellant's forces from Pond Nos. 7, 8, and 9. The appellant seems to have proceeded with its excavation work only upon the basis of its dealings with the inspector, since excavation of the ponds was completed prior to September 1964, the month in which the Regional Engineer was said to have agreed to a 100 percent rock billing; therefore, the Regional Engineer in assenting to such billing probably was "backing up" his inspector as an initial

⁵ Tr. 174-175.

⁶ Tr. 214-229.

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reaction rather than relying upon his own analysis of the proper method of rock measurement.

The contracting officer rejected the 100 percent rock billing when it was presented to him in September 1964. The Board does not know what motivated the preparation of a memorandum dated September 24, 1964 (included in the appeal file), to the Regional Engineer from the inspector who was subsequently dismissed. As has been noted, the inspector did not testify at the hearing on this appeal. In the memorandum he retreated from his earlier position that the excavation work at Pond Nos. 7, 8, and 9 should be billed as 100 percent rock. The memorandum is critical of the equipment used for pond excavation by the appellant and concludes:

On very close observation of the removal of this rock and on the contractors second pay estimate and after 50% of the rock excavation had been removed, I thought that this excavation in this disputed area was no greater than 30 to 35% rock, and allowed it on this second pay estimate.

Now they are wanting 100% rock in the areas of raceways 7, 8, and 9, and the areas between 7 & 8—8 & 9 Raceway, on west side of Raceway No. 9, in roadway adjacent to Raceway and Hatchery Building, also at ends of 4-5, 6, to 7, 8-9 Raceway; based on close observation of this project and others I have worked 35% is a fair and just amount for this item.

The contracting officer's refusal to pay for the material from Pond Nos. 7, 8, and 9 as 100 percent rock was on the strength of advice given by a civil engineer and a construction foreman employed by his agency. The civil engineer gave the following testimony at the hearing (Tr. 192):

* * * with a material of any type from sand on up through boulders three and four yards in quantity, you have to figure it by voids or spaces between your stone which is filled with air, water, or what not. Normally, in a dump material or a loose material, you will have voids in these depending again on your aggregate size which will run from forty to seventy percent of the volume. Now, of course, the bigger your aggregate gets, the more voids you will have that you have to fill. * * *

He also stated that a power shovel would have removed the fill material (small gravel up to 3 and 4 cubic yard boulders) at Pond Nos. 7, 8, and 9 (Tr. 193):

Why certainly. They make power shovels that can pick up five cubic yards, * * * and the material was loose dumped. It wasn't compacted. It wasn't natural, and with any power shovel of any size, you can pick up boulders, rip them out of the ground with no trouble at all.

The construction foreman did not witness the removal of the material from the ponds—the inspector who was discharged apparently

was the only Government employee who did—but observed “raceway [pond] areas 7, 8, and 9” after they had been excavated and backfilled. He testified (Tr. 233) :

* * * At that time, you could see in the banks of the cut in the undisturbed area. * * * There were very few evidences of any large rock having been there, because if there had been, they would have had to be blasted and portions of them left in the bank, or there would have been holes in the bank where the large rock would have been pulled out * * * because some of them would naturally protrude into the bank. * * *

Decision (Claim No. 1)

The appellant encountered a changed condition at the sites for Pond Nos. 7, 8, and 9, because the rock measurement method specified in the contract could not be followed without utilizing a power shovel to dislodge the larger boulders and separate them from the smaller material. The appellant could not be charged under Section 6 of the Technical Specifications with a duty to have a power shovel at the site. The equipment brought to the project by the appellant could move boulders of the size listed in the invitation by the Government.

The appellant did not take action under Clause 4 (Changed Conditions) of the contract's General Provisions when the three and four cubic yard boulders were found. Rather than giving the contracting officer the opportunity to consider alternative methods of boulder measurement, the appellant concentrated on convincing the inspector that the total volume of excavated material should be reported for payment purposes as rock. That solution to the measurement problem was extremely advantageous from the appellant's standpoint. Measuring the material on a boulder by boulder basis at the first six ponds had resulted in only approximately 100 cubic yards of material being paid for at the \$20 “rock” price. Giving effect to the appellant's arrangement with the inspector would require the Government to pay for more than 1650 cubic yards of “rock,” and would increase the cost of removing and disposing of material from three ponds by more than \$35,000. The appellant was obliged to remove and dispose of “non-rock” material for a consideration included in the lump-sum price it bid for each pond. It should be observed also that the method of measurement worked out between the appellant and the inspector ignores the provision of Section 62-01.1a that measurements for payment purposes for rock excavation will be of the *actual volume removed*.

The appellant did not introduce pictures or other evidence to show what the layers of material removed from the pond looked like just

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prior to the removal of such layers.⁷ The daily logs that were kept by the Government's inspector show that not more than 90 man hours of time were spent by drillers and a powder man in performing blasting work at Pond Nos. 7, 8, and 9.⁸ More than one-half of the drilling and blasting man hours were required on August 12, 13, and 14, 1964 (three days out of a total 17-day period during which excavation work was carried out at the three ponds). It was at Pond 9 that the inspector was persuaded to report the excavation as all rock for payment purposes. His daily log for August 13, 1964, shows that the first drilling and *blasting work at Pond No. 9* was performed on that date.

The most reasonable course of action that could have been followed when the large massed boulders presented the parties with a measurement problem was one that the contracting officer had the right to direct under the Changed Conditions clause. This was bringing onto the work site at Government expense a power shovel large enough to move out the boulders to allow those meeting the "rock" definition to be measured. The Board sees no justification whatever for treating all of the volume as rock. We have noted that the appellant's counsel has conceded that a change or amendment was required because of the measuring difficulty. The adjustment required because this change became necessary must be equitable to the Government as well as to the contractor, and under either Article 3 or 4 must relate to the *contractor's cost*. It would not be reasonable to use as a basis for the price adjustment an absolute extension of the twenty dollar unit price. That price certainly was not intended to be applied to the total volume of the excavation in the pond areas, since both parties knew that the material to be taken out at the pond sites was (as described by the appellant) "filled ground." The conduct of the parties in measuring each large boulder at the first six ponds established their intent to distinguish between such boulders and the gravel, soil and sand that also was present.⁹

The inspector was not empowered to authorize a change or to agree upon a new measurement method once a changed condition was discovered.¹⁰ In seeking entitlement to a method of measurement under

⁷ There are pictures in the appeal record of some large piled-up boulders that were taken out of the pond sites; however, these pictures do not help in the inquiry as to what percentage of the total removed material should have been measured as rock excavation.

⁸ This figure may be high by approximately 40 hours, since the appellant's general superintendent testified that the powder man "did the drilling and the shooting" in the ponds. (Tr. 64). On the other hand, the powder man may have performed work for short periods of time that do not show on the records. (Tr. 65)

⁹ A decision of this Board which discusses the importance of the conduct of the parties as it bears upon interpretation of a contract is *General Electric Company*, IBCA-451-8-64 (April 13, 1966), 66-1 BCA par. 5507.

¹⁰ *Jefferson Construction Co. v. United States*, 151 Ct. Cl. 75 (1960), affirming *Jefferson Construction Co.*, ASBCA No. 2249 (June 20, 1957), 57-1 BCA par. 1330.

which it would be paid about \$12,000 per pond for removing boulders, when at the first six ponds the highest payment for such work at one pond had been less than \$500, the appellant should have dealt with the contracting officer, or at least the Regional Engineer. Further, their consideration of the matter should have been a time when the actual boulder condition could have been observed and when the Government could have kept detailed day to day job records. The contracting officer justifiably refused to carry out what he regarded as an improper understanding between the contractor and a complaint inspector.

The burden is on the appellant to demonstrate that the contracting officer erred in determining that 35 percent of all excavation for Pond Nos. 7, 8, and 9 (and adjacent access drives and a roadway) should be classified and paid for as rock excavation.¹¹ We reject the appellant's rationale under which 100 percent of the material taken from those ponds would be treated as rock for payment purposes, and the appeal record does not provide support for either an increase or decrease in the amount allowed by the contracting officer. Therefore, the decision of the contracting officer denying Claim No. 1 is affirmed.

Claim No. 3

The requirement for installing the three propane tanks that are involved in Claim No. 3 is contained in Section 36, which states that the concrete for the tanks "shall be in conformance with the requirements of Section 10,¹² 'CONCRETE FOR FIELD PONDS.'" Section 36 also includes instructions about concrete reinforcement, and informs the contractor that payment for the propane tanks "will be made as set out under Section 62, 'MEASUREMENTS AND PAYMENTS.'" Section 62-24.1 provides:

PAYMENT for PROPANE GAS STORAGE TANKS will be made at the LUMP SUM PRICE as bid therefor for *EACH CAPACITY* UNDERGROUND PROPANE GAS STORAGE TANK which price shall cover all costs for labor, materials, equipment, and transportation for furnishing and installing the tanks, valves, regulators, fittings, measuring devices, and other standard items or accessories not specifically mentioned herein, making all connections, and allied items; all in accordance with the drawings, specifications and as staked, complete for acceptance.

The bid items (Nos. 54 and 55) for the propane tanks indicated that the prices bid are for tanks "in place, complete."

The appellant asks to be paid for the concrete ballast placed above the propane tanks at the unit price (\$50 per cubic yard) bid for con-

¹¹ *Parker-Schram Company*, IBCA-118 (January 11, 1960), 60-1 BCA par. 2500.

¹² Section 10 covers technical questions such as mixing, placing and finishing the concrete and does not deal with the questions of measurement and payment.

March 23, 1967

crete thrust blocks, anchor blocks, bearing pads, and outfall pads. The measurement and payment subsections applicable to such blocks and pads are found in Section 62-17:

62-17.1 MEASUREMENT

62-17.1a MEASUREMENT for payment purposes of CONCRETE THRUST BLOCKS, ANCHOR BLOCKS, BEARING PADS, AND OUTFALL PADS will be made of the *ACTUAL NUMBER OF CUBIC YARDS* of CONCRETE furnished and installed in the THRUST BLOCKS, ANCHOR BLOCKS, BEARING PADS, AND OUTFALL PADS in accordance with the drawings and as staked.

62-17.1b VOLUME will be determined to the NEAREST CUBIC YARD OF CONCRETE AND WILL BE BASED ON THE *NEAT LINE SECTIONS* as shown on the drawings.

62-17.2 PAYMENT

62-17.2a PAYMENT for CONCRETE THRUST BLOCKS, ANCHOR BLOCKS, BEARING PADS, AND OUTFALL PADS will be made at the UNIT PRICE per CUBIC YARD as bid therefor for CONCRETE FOR THRUST BLOCKS, ANCHOR BLOCKS, BEARING PADS, AND OUTFALL PADS, which price shall cover all costs for labor, materials, equipment, and transportation for excavation, furnishing and placing the Concrete, filling and backfilling, all in accordance with the drawings, specifications, and as staked, complete for acceptance.

In a letter dated May 21, 1965, the contractor stated that its original estimate did not include amounts for installation of concrete under the propane tank bid items; in addition, the letter asserted that a concrete ballast pad is not a "standard item in connection with the installation of an underground tank of this type." The contracting officer's findings¹³ conclude with respect to the ballast pads:

Paragraph 62-17.1 of the Technical Specifications covers measurement and payment of Bid Item No. 38. It states in part that *the volume* will be determined to the nearest cubic yard of concrete and will be based on the *neat line sections as shown on the drawings*.

The ballast detail for the underground tanks on the drawings were not drawn to scale, therefore, *the volume* of concrete used on the tanks could not be based on the "neat line sections as shown on the drawings." Also the ballast detail for underground tanks covered *all tanks* and there were one 2,000 gallon tank and two 500 gallon tanks. Neither the drawings or specifications implies that the ballast pads on the tanks would be paid for as a separate item under Item No. 38 of the Bidding Schedule.

The claim is for \$1,000 (20 cubic yards of concrete at \$50 per yard). A ballast pad is clearly shown on a contract drawing as a concrete collar, shaped around the top of a representative underground tank. The tank appears above the description "BALLAST DETAIL FOR U.G. TANKS" (not drawn to scale) on Drawing Number 4F ARK-1343-4.0 (sheet 2 of 3), attached to the specifications. The statement, "CONC. PAD, MIN. 8" THICK AND FULL LENGTH

¹³ Dated September 17, 1965.

OF TANKS," is printed next to the drawing. Thus, installation of the pads was clearly required by the contract.

The inspector who subsequently was dismissed for poor job performance included most of the quantity of concrete involved in this claim in a pay estimate. Payment for the concrete was made, but contracting officer deleted the quantity on a later estimate and made a monetary adjustment in favor of the Government when he learned that concrete for the underground tank ballast pads had been paid for under Item No. 38 (thrust and anchor blocks, bearing and outfall pads).

The concrete ballast pads are not thrust blocks, anchor blocks, bearing pads or outfall pads. The appellant's general superintendent stressed the contention that "in place" concrete should be paid for under Item No. 38 (Tr. 103); however, the words "in place" follow the block and pad descriptions in that item. There is no general authorization in the item to pay for "in place" concrete.

The Government's civil engineer testified that "it is practically mandatory" that concrete ballast pads be used when propane tanks are "put in the ground" as the specifications required.¹⁴ He also stated that attachment of a ballast pad was a requirement on "any job we do," and is "part of the installations."¹⁵

Because the drawing shows the pad as part of an underground tank, and in view of the statement in the payment section that the propane tank price "shall cover all costs for labor, materials, equipment, and transportation for furnishing and installing the tanks, valves, regulators, and other standard items or accessories not specifically mentioned herein, making all connections, and allied items, all in accordance with the drawings * * *" we find that the contracting officer properly denied making payment for the concrete in the ballast pads on the basis of a separate unit price.

Conclusion

Appeal Nos. 1 and 3 are denied in their entirety.

DEAN F. RATZMAN, *Chairman*.

WE CONCUR:

THOMAS M. DURSTON, *Deputy Chairman*,

WILLIAM F. MCGRAW, *Member*.

¹⁴ Tr. 245.

¹⁵ Tr. 246, 247.

February 24, 1967

THE WILDERNESS ACT***Constitutional Law**

A Congressional directive for the review by the Secretary of the Interior of areas with wilderness characteristics within a 10-year period affects neither the Executive's authority to make recommendations nor the authority of Congress to enact legislation, should the specified time period not be complied with.

Statutory Construction: Generally

The Wilderness Act was not intended to lower the existing standards with respect to units of the national park and national wildlife refuge systems.

Designation of an area as wilderness by act of Congress is a Congressional withdrawal of the area from "public land" status and brings into application certain sections of the Wilderness Act prohibiting, *inter alia*, commercial enterprises and permanent roads.

Statutory Construction: Legislative History

The language of the Wilderness Act and its legislative history indicate that Congress did not intend to open up to mining, oil and gas leasing, water resource projects, and other commercial activities areas that are now closed to such activities. Regarding areas where such activities now occur, proposed legislation recommending wilderness status to an area open to mining, oil and gas leasing, water resource projects or reclamation authorizations should contain an express provision terminating or authorizing these activities, since the Congressional intention on this issue is not clear.

Mines and Mining

Lands which have been reserved from the public domain or acquired by the United States are not subject to the mining laws, unless opened by statute, or a withdrawal order provides for the continued applicability of the mining laws, or a later withdrawal order reinstates the applicability of the mining laws.

Mineral Leasing Act: Generally—Mineral Leasing Act for Acquired Lands: Generally

The withdrawal of land from only public land status, e.g., from entry, location, selection, sale or other disposition does not toll the applicability of the mineral leasing laws. The withdrawal order must express a clear intent to toll the applicability of the mineral leasing laws.

M-36702

February 24, 1967

TO: SECRETARY OF THE INTERIOR.

SUBJECT: THE WILDERNESS ACT.

At the meeting in your office on November 22, 1966, you asked three

*Not in Chronological order.

questions regarding the designation of areas administered by the Interior Department as wilderness under the provisions of the Wilderness Act, 78 Stat. 890 (1964), 16 U.S.C., sec. 1131 (1964) :

1. What are the consequences of failure to comply with the time schedule specified in section 3(c) of the act?
2. What form of legislation is required to accomplish designation as a wilderness area?
3. Must proposed legislation accompany a wilderness recommendation?

1.

Under section 3(c) of the act, Interior is to complete its review and make its recommendations to the President within ten years from September 3, 1964. The President in turn is to make his recommendations to Congress not later than September 3, 1967, with respect to not less than one-third of the Interior areas; not later than September 3, 1971, with respect to not less than two-thirds of these areas; and he is to complete recommendations as to the remainder by not later than September 3, 1974.

The act specifies no consequences in the event of failure to meet these deadlines. Obviously, the Executive retains its constitutional power to make recommendations to Congress at any time. Likewise, Congress's power to legislate is unfettered. The time schedule specified, therefore, is nothing more than an instruction of an internal nature from the Congress to the President and affects neither the President's authority to make recommendations nor the authority of Congress to enact legislation. Accordingly, there are no legal consequences which ensue from the failure to meet the specified deadlines.

2.

As regards the form of legislation required to accomplish designation of a wilderness area, it should first be noted that only those wilderness areas in national forests created by the Wilderness Act itself are affected by the provisions of sections 4 (c) and (d) of the act which set out specific prohibitions or authorize the conduct of particular activities therein.¹ These sections of the act would not apply

¹ Section 4(d)(2) may be an exception since, while it refers only to "national forest wilderness areas," it does not in terms limit the reference to national forest wilderness areas designated as such by the act. Compare secs. 4(c) ; 4(d) (1), (3), (4) and (6) ; 5 (a) and (c) ; and 6. Section 5(b), which also refers to national forest wilderness areas, likewise does not in terms limit the reference to those areas designated by the act. No opinion is ventured as to whether either section 4(d)(2) or 5(b) will extend to other national forest wilderness areas if designated in the future. It is, however, clear from their text that the omission from sections 4 (a) and (b) of a limitation to wilderness areas designated by the act is intentional. These provisions obviously will apply to wilderness areas designated in the future unless Congress should provide otherwise.

to Interior areas which might in the future become wilderness areas. Thus, if Congress should in the future enact a law which merely designates particular Interior areas as "wilderness areas" and does nothing more, that law would not invoke the prohibitions specified in 4(c) nor bring into play the special provisions set out in 4(d) which, among other things, continue the mining and mineral leasing laws in effect until midnight of December 31, 1983.

Second, it should be borne in mind that the Wilderness Act itself contains provisions intended to assure against the lowering of existing standards with respect to units of the national park system that may in the future be designated as wilderness. Section 3(c), which directs the review of Interior areas for potential wilderness status, provides that nothing contained therein shall "be construed to lessen the present statutory authority of the Secretary * * * with respect to the maintenance of roadless areas within units of the national park system." Section 4(a)(3) provides that "the designation of any area of any park, monument or other unit of the national park system as a wilderness area * * * shall in no manner lower the standards evolved for the use and preservation of such park, monument, or other unit of the national park system" in accordance with the organic act of the National Park Service, the act of August 25, 1916, 39 Stat. 535, as amended, 16 U.S.C. sec. 1 *et seq.* (1964), or the statutory authority under which the unit was created or under certain other acts including, among others, the Antiquities Act of June 8, 1906, 34 Stat. 225, 16 U.S.C. secs. 431-433, and the Historic Sites Act of August 21, 1935, 49 Stat. 666, as amended, 16 U.S.C. sec. 461 *et seq.* (1964).

The act of August 25, 1916, provides that the National Park Service is to promote and regulate the use of national parks, monuments and other reservations committed to its care so as to conform to their fundamental purpose. That purpose is to "conserve the scenery and the natural and historic objects and the wild life therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." In this regard, acts for many individual park areas supplement this objective by providing that the Secretary of the Interior shall make regulations providing for the preservation, from injury and spoilation, of timber, mineral deposits, natural curiosities, or wonders within the park and their retention in their natural condition. (E.g., 16 U.S.C. secs. 22, 45b, 61, 92.)

Section 2(a) of the Wilderness Act has a somewhat similar but more detailed statement of purpose specifying that congressionally desig-

nated wilderness areas "shall be administered for the use and enjoyment of the American people in such manner as will leave them unimpaired for future use and enjoyment as wilderness, and so as to provide for the protection of these areas, the preservation of their wilderness character, and for the gatherings and dissemination of information regarding their use and enjoyment as wilderness." * * * Both statements of purpose include the concept of preservation for the benefit of future generations. The only substantial difference, I believe, lies in the emphasis that the Wilderness Act lays on solitude and on avoiding the incursion of the accoutrements of civilization such as roads and accommodations for tourists and visitor convenience.

Considering both the Wilderness Act statement of purpose and the provisions of sections 3(c) and 4(a)(3) which guard against the lowering of national park system standards by the creation of wilderness areas covering national park system lands, it is obvious that Congress could only have intended by the Wilderness Act that wilderness designation of national park system lands should, if anything, result in a higher, rather than a lower, standard of unimpaired preservation.

Third, while not as explicit with respect to them, the act compels the same conclusion in the case of wildlife areas which may be designated as wilderness. Section 4(b) of the act makes it the duty of an agency administering a wilderness area for any other purposes for which it was established to so administer it for such other purposes as to preserve its wilderness character.

Finally, it should be noted that the wilderness designation of an area by act of Congress is a Congressional withdrawal or reservation of the area from "public land" status (i.e., the withdrawn area is closed to entry, location, selection, sale or other disposition for administration as wilderness). There is no question that Congress can make a legislative withdrawal of an area, and by the provisions of the enactment restrict the activities which may take place upon the area. Accordingly, any act of Congress which simply designates an Interior administered area as "wilderness" would amount to a later, additional reservation of the area from "public land" status. Such a designation would bring into play sections 2(a), 2(b), 4(a) and 4(b) of the Wilderness Act. It could then be argued that such a Congressional designation would toll the applicability of the mining laws, the mineral leasing laws, and the development of water resource projects within the boundaries of a designated wilderness area, since mining, prospecting, mineral leasing, and water projects are clearly incompatible with the concept of wilderness preservation as expressed by Congress in section 2 of the act.

However, because of the variations in the bills introduced in the 87th and 88th Sessions of Congress regarding the method by which a wilderness system could be established, the legislative history of these bills, and the fact that the final enactment was a composite of the House and Senate versions, I should like to comment on the principal issues that appear to be presented regarding the form of legislation giving wilderness designation to lands under Interior administration.

The first issue is the extent to which it may be necessary or desirable to expressly restrict the applicability of the mining laws where it is intended that such activities not take place within a designated wilderness area.

It is long-settled law that notwithstanding the broad textual reference in the mining laws to "lands belonging to the United States, both surveyed and unsurveyed,"² unless the lands are "public lands" i.e., open to entry, location, selection, sale or other disposal under the general public land laws, they are closed to activity under the mining laws. *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Rawson v. United States*, 225 F. 2d 855 (9th Cir. 1955), *cert. den.*, 350 U.S. 934 (1956). Thus, where lands have been reserved from the public domain, or acquired by the United States, the mining laws are inapplicable. *Rawson v. United States*, *supra*; 17 Ops. Att'y Gen. 230 (1881).

The rationale for this construction has been thus expressed:

This section is not as comprehensive as its words separately considered suggest. It is part of a chapter relating to mineral lands which in turn is part of a title dealing with the survey and disposal of "The Public Lands." To be rightly understood it must be read with due regard for the entire statute of which it is but a part, and when this is done it is apparent that, while embracing only lands owned by the United States, it does not embrace all that are so owned. Of course, it has no application to the grounds about the Capitol in Washington or to the lands in the National Cemetery at Arlington, no matter what their mineral value; and yet both belong to the United States. And so of the lands in the Yosemite National Park, the Yellowstone National Park, and the military reservations throughout the western States. Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply; and it never applies where the United States directs that the disposal be only under other laws. *Oklahoma v. Texas*, *supra*, at 599-600.

The only exceptions to this rule are statutory; where the withdrawal or reservation itself provides for the continued applicability, as to any or all minerals, of the mining laws; or where by a later order, the mining laws are made applicable. For example, Mt. McKinley National Park, Death Valley National Monument, Glacier Bay National Monu-

² Act of May 10, 1872, sec. 1; R.S. 2319; 30 U.S.C. sec. 22.

ment, and Organ Pipe Cactus National Monument are at present open to mining by specific statutes.³ The Pickett Act of June 25, 1910, as amended (43 U.S.C. secs. 141-142), continues the applicability of the mining laws as to metalliferous minerals to withdrawals made thereunder and national forests remain open to mining location by reason of 16 U.S.C. sec. 478, and to mineral leasing under 30 U.S.C. sec. 181. The general withdrawals of public lands accomplished by E.O. No. 6910 of November 26, 1934, and E.O. No. 6964 of February 5, 1935, being made under the Pickett Act, left the mining laws applicable as to metalliferous minerals, and Congress in section 7 of the Taylor Grazing Act (43 U.S.C. sec. 315t) made both the mining and mineral leasing laws applicable to the lands embraced thereby.

For the above reasons, the mining laws are inapplicable to all national parks and monuments, except for the four specifically open to mining by statute, and, except as may otherwise be specifically provided for by statute or order, the same conclusion applies to all other units of the national park system and to all units of the national wildlife refuge system.⁴ It is obvious that a Congressional designation as wilderness will not make the mining laws applicable to those areas of the national park system or of the national wildlife refuge system where those laws do not now apply. Accordingly, for all areas of the national park system and the national wildlife refuge system which are now closed to mining, there is no necessity to include in the proposed legislation a section which specifically terminates the applicability of the mining laws on these areas.

Regarding the four areas of the national park system which are presently subject to the mining laws by statute and the six units of the national wildlife refuge system which are subject to the mining laws by the establishing withdrawal orders,⁵ a different problem is presented.

The wilderness bills introduced in the Senate during the 87th Congress (S. 174) and the 88th Congress (S. 4) provided for the inclusion of Interior areas into the wilderness system by administrative action. Both bills provided that if neither the House nor the Senate dis-

³ 16 U.S.C. sec. 350; 16 U.S.C. sec. 447; 49 Stat. 1817; and 16 U.S.C. sec. 450z, respectively.

⁴ In examining withdrawal orders establishing units of the national wildlife refuge system special consideration must be given to whether the area was withdrawn under the Pickett Act, rather than the inherent authority of the President to administer the public domain. Prospecting and mining for metalliferous minerals is permitted under a Pickett Act withdrawal.

⁵ Clarence Rhode National Wildlife Range, Alaska; Cabeza Prieta Game Range, Arizona; Kofa Game Range, Arizona; Chas. M. Russell National Wildlife Range, Montana; Desert Game Range, Nevada; and Charles Sheldon Antelope Range, Nevada.

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approved the inclusion into the system of a reviewed and recommended area, the area automatically became a part of the system. In commenting on S. 174 and S. 4 the Department stated that the mining laws would continue to apply to those portions of the four areas of the national park system which might be included in the wilderness system. (See S. Rept. 635, 87th Congress, 1st Session, pp. 12-13; S. Rept. 109, 88th Congress, 1st Session, p. 10.) In commenting on S. 4 the Department also stated that it viewed section 6(a), which provided that nothing in the act shall be interpreted as interfering with the purposes stated in the establishment of any park or monument or other units of the national park system or any wildlife refuge or game range, and section 6(c) (5), which provided that any existing use or form of appropriation authorized or provided for in the Executive Order or legislations establishing any national wildlife refuge or game range existing on the effective date of this act may be continued, as preserving the status quo to the maximum extent in the management of the Federal reservations.⁶

The wilderness bills introduced in the House during the 87th Congress (H.R. 776)⁷ and the 88th Congress (H.R. 9070 and H.R. 9162)⁸ provided for the designation of areas for inclusion in the wilderness system by act of Congress, rather than administrative action. The House bills provided generally, as now contained in section 4(a) of the Wilderness Act, that the purposes of the act are within and supplemental to the purposes for which units of the national wildlife system and national park system are established and administered and that nothing in the act shall modify the statutory authority under which units of the national park system are created. In commenting on the House bills the Department stated that subsequent enactments designating particular areas as wilderness will need to contain provisions which are deemed appropriate with respect to non-wilderness uses, i.e., mining, mineral leasing, etc.⁹

In the light of the Department's comments on the various House and Senate bills, the fact that the final enactment was a composite of both House and Senate versions, and the judicial disfavor of repealing specific statutes by implication, I would suggest that any legislation

⁶ Letter of February 21, 1963, to the Chairman, Committee on Interior and Insular Affairs, U.S. Senate. S. Rept. 109, pp. 22-24. See also p. 11 of S. Rept. 109.

⁷ In the 87th Congress eight bills were introduced. H.R. 776 received major consideration including Committee report.

⁸ In the 88th Congress 19 bills were introduced. H.R. 9070 and H.R. 9162 received major consideration with the Committee reporting on H.R. 9070.

⁹ Letter of December 12, 1963, to Chairman, Interior and Insular Affairs Committee, House of Representatives, H. Rept. 1538, 88th Congress, 2d Session, p. 15.

recommending wilderness status for Mt. McKinley National Park, Death Valley National Monument, Glacier Bay National Monument, Organ Pipe Cactus National Monument, and the previously discussed six units of the national wildlife refuge system contain a section which *expressly extends or terminates*, as may be determined to be desirable in any given case, the applicability of the mining laws on the recommended wilderness area. Only through an act of Congress which specifically resolves the issue of the applicability of the mining laws to those areas which are subject to the mining laws by statute or Executive or public land order, can the created ambiguities be resolved.

The second issue relates to the extent to which it may be necessary or desirable to expressly restrict the applicability of the mineral leasing laws where it is intended that such activities not take place within a designated wilderness area.

Unlike the Mining Law of 1872, the Mineral Leasing Act specifically denominates certain classes of government-owned lands that are excluded from its operation. These are lands in incorporated cities, towns, and villages, in national parks and monuments, in the naval petroleum and oil shale reserves, lands acquired under the Appalachian Forest Act, and lands acquired by the United States subsequent to passage of the act.¹⁰ Here again it is obvious that lands in national parks and monuments, being expressly excluded from the Mineral Leasing Act, will not become subject thereto by being designated as wilderness.¹¹ Similarly, areas of the national wildlife refuge system which are specifically closed to mineral leasing by the terms of a public land or Executive Order will not become subject to the mineral leasing activities through a wilderness designation. In addition to the reasons previously discussed this conclusion is also supported by section 4(a) of the act, which states "The purposes of this Act are hereby declared to be within and supplemental to the purposes for which * * * units of the national park and national wildlife refuge systems are *established and administered*." (Italics added.)

Regarding the application of the mineral leasing laws, the Department has held over the years that a withdrawal of land from only "public land" status, e.g., from entry, location, selection, sale or other disposition, does not toll the applicability of the mineral leasing laws. *Solicitor's Opinion*, 48 L.D. 459 (1921); *Martin Wolfe*, 49 L.D. 625 (1923); *J. D. Mell et al.*, 50 L.D. 308 (1924); *Noel Teuscher*, 62 I.D.

¹⁰ 30 U.S.C. sec. 181.

¹¹ National parks and monuments are also specifically excluded from the operation of the Mineral Leasing Act for Acquired Lands, 30 U.S.C. secs. 351-359. Consequently the same conclusion is applicable.

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210 (1955). This interpretation was upheld by the Supreme Court in *Udall v. Tallman*, 380 U.S. 1 (1965). The withdrawal order must express a clear intent to toll the application of the mineral leasing laws. The withdrawal of land from mineral leasing should not be confused, however, with the Secretary's discretionary authority to refuse to grant a mineral lease. In the *Tallman* case, *supra*, the Kenai Moose Range was open to mineral leasing, but the Secretary refused to grant leases until adequate plans were developed for the protection of the wildlife values of the area. The manner in which the Secretary exercises this discretion regarding oil and gas leases on areas of the national wildlife refuge system is set forth in 43 CFR 3120.3-3. The exercise of this discretion by refusing to lease is not a withdrawal of the area from mineral leasing and a wilderness designation of such an area would not, in my judgment, toll the mineral leasing laws. On the other hand, land *withdrawn* from mineral leasing would be permanently closed to leasing by the granting of wilderness status to such an area because of the application of section 4(a).

Accordingly, I would recommend that a section specifically extending or terminating the mineral leasing laws, as may be determined to be desirable in any given case, be included in any proposal to grant wilderness status for all areas of the national wildlife refuge system which are not closed to mineral leasing by a public land or Executive Order, and all units of the national park system, except parks and monuments.

Should the geothermal steam leasing legislation become law in the form in which the Department transmitted it to the Congress on February 2, any wilderness area created on the lands of the national park system which are administered in accordance with the act of August 25, 1916, on areas of the national wildlife refuge system, on fish hatchery lands or on lands within a national recreation area would be closed to geothermal leasing. The reason is that under section 15(c) of the bill such lands would not, in their present status, be open to geothermal leasing. For reasons already discussed, inclusion of such lands in wilderness areas would continue their non-availability for geothermal leasing. I would, however, recommend a specific section which would eliminate the applicability of the geothermal leasing provisions in any bill designating as wilderness any portion of an area of the national park system that is not administered pursuant to the act of August 25, 1916, or is not within a national recreation area, even though it may be argued that the Congressional designation of the area as wilder-

ness and application of sections 2 and 4 of the Wilderness Act prohibits such leasing activities.

In this context I would like to discuss one final issue, which is the development of water and power projects within the boundaries of areas which may receive wilderness designation. There are several areas of the National Park System which are subject to water development projects by the Bureau of Reclamation (e.g., Lassen National Park, 16 U.S.C. sec. 201; Glacier National Park, 16 U.S.C. sec. 161; Grand Canyon National Park, 16 U.S.C. sec. 227). Accordingly, I would recommend that legislation giving wilderness status to such areas of the national park system contain a section specifically continuing or tolling the applicability of previous Bureau of Reclamation authorizations, whichever may be considered to be desirable in each case.

3.

Section 3(c) of the Wilderness Act calls for the Secretary to make recommendations as to wilderness status to the President and he, in turn, to the Congress. The law does not specify that a form of legislation shall be included with a favorable recommendation. However, I think it both logical and desirable that we propose the legislation by which our recommendation would be carried out. If recommendations are transmitted in a group, an omnibus type bill would be proposed.

A prototype draft of bill is under preparation. This draft will be useful in determining general format. Special provisions applicable to a particular area could, of course, be worked out later in connection with the recommendations for that area. The prototype bill could be adopted to omnibus form covering a number of areas. I shall transmit a draft shortly.

FRANK J. BARRY,
Solicitor.

APPEAL OF KEAN CONSTRUCTION COMPANY, INC.

IBCA-501-6-65 *Decided April 4, 1967*

Rules of Practice: Appeals: Generally—Contracts: Construction and Operation: Changes and Extras—Contracts: Construction and Operation: Actions of Parties

Where in a motion for reconsideration the appellant questions the Board's finding that a substantial portion of a claim for rock excavation represents

work performed below subgrade for which the contract provides no basis for reimbursement but fails to show that the contracting officer or the Government engineering personnel concerned were involved in any way in the appellant's decision to proceed with the subgrade excavation, the Board's earlier decision that the work so performed was voluntary and not of the character for which the Government is liable is affirmed.

**Rules of Practice: Appeals: Burden of Proof—Rules of Practice: Evidence—
Rules of Practice: Witnesses—Contracts: Disputes and Remedies:
Substantial Evidence**

In cases involving a hearing the weight to be given to documents included in the appeal file on controverted issues is dependent upon the nature of the evidence offered in support by the party concerned; hence, the Board will accord only limited weight to the uncorroborated portion of an affidavit of a former officer of the appellant corporation who purports to have personal knowledge of the facts pertaining to the issues in dispute, even though the appellant shows by uncontradicted testimony that the former officer is no longer employed by the corporation and that his present whereabouts are unknown.

BOARD OF CONTRACT APPEALS

The appellant has requested the Board to reconsider the portion of its decision of November 9, 1966, concerning the quantum of rock excavation for which payment should be made. The grounds of the Board's decision were set forth in detail in the principal opinion. They will not be repeated here. We shall undertake, however, (i) to set forth at some length the factors considered in resolving disputed questions of fact; (ii) to show the setting in which the appellant's claim is to be viewed; (iii) to comment briefly upon the principal arguments advanced by the appellant in support of its motion for reconsideration; and (iv) to amplify our remarks in the principal opinion concerning volunteer work.

Central to the appellant's position is the argument that the cross-sections submitted with its letter of September 21, 1964 (Exhibit No. 5),¹ should be accepted as determinative of the quantity of rock excavation. The appellant calls our attention to the fact that such cross-sections reflect the only calculations based on actual field measurements both before and after excavation, asserting that they represent the only evidence of the quantity of rock excavated.

¹ Except as otherwise indicated all references to exhibits are to the appeal file.

Resolution of Disputed Questions of Fact

In view of the circumstances surrounding the preparation and submission of appellant's cross-sections, the Board is unable to regard them as controlling in any way except as a starting point for determining the "pay" quantity of rock (principal opinion, p. 23). The contract makes the Government responsible for the preparation of cross-sections. The appellant admits this but attempts to justify its preparation of cross-sections on the ground that the Government engineer concerned, Mr. Otis Pauley, had refused appellant's request that the Government make cross-sections of the area in which rock excavation was claimed (principal opinion, note 25; Tr. 168). In his testimony the Government engineer categorically denied receiving such a request (principal opinion, note 6; Tr. 227, 258). His denial was directly in conflict with that given by appellant's grade foreman (principal opinion, note 26; Tr. 86) and contrary to assertions made by appellant's superintendent, John P. Lamb, in his affidavit of November 5, 1964 (Exhibit No. 5; principal opinion, p. 8). Appellant's president, William M. Kean, testified that Mr. Lamb was no longer in the company's employ and that he did not know his present whereabouts. This testimony was sufficient to avoid the application of the absent witness rule.² It did not overcome, however, the extremely limited weight accorded to testimony offered by affidavit in cases involving a hearing;³ nor did it compensate for the fact that the Government was deprived of the opportunity to cross-examine a witness upon whom the appellant's whole case turned, in so far as the validity of the cross-sections in question are concerned.⁴

² Cf. Harold Hiebert, d/b/a *Hiebert Contracting Company*, IBCA-521-10-65 (February 15, 1967, 67-1 BCA par. 6138 (appellant's assertions at hearing accepted as true despite denials by Government representative in an affidavit included in the appeal file); *Martin Oboler, d/b/a Associated Wire Industries*, ASBCA No. 6065 (June 27, 1961), 61-1 BCA par. 3094 (inference drawn that testimony of absent witness having first-hand knowledge of the disputed facts would have been unfavorable to appellant).

³ Appellant's counsel was advised that the documents comprising the appeal file would be accorded varying degrees of weight depending upon the support offered by the parties concerned (Tr. 203).

⁴ The cross-sections were prepared by the appellant's president, Mr. Kean, who is neither an engineer nor a geologist (Tr. 149, 150), from field notes given to him by Mr. Lamb (Tr. 152, 153). Mr. Blackmon, appellant's grading foreman, reaffirmed at the hearing (Tr. 86) the statements made in his affidavit of November 5, 1964 (Exhibit No. 5). One of such statements was that Mr. Lamb had made cross-sectional measurements of the area in question before and after excavation. Mr. Blackmon did not, however, purport to pass upon the accuracy of such measurements; nor would he have been qualified to do so, as he

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The same pattern exists with respect to the question of whether, prior to requesting the Government engineer to make cross-sections and prior to the appellant proceeding with its own cross-sections upon the alleged refusal of such request, the appellant demonstrated to the Government engineer the efforts to remove the hard substance with power equipment alone as described in the affidavits of Messrs. Lamb and Blackmon (Exhibit No. 5; principal opinion, note 2). Mr. Blackmon reaffirmed and reasserted the statements made in his affidavit at the hearing (Tr. 86). Mr. Pauley flatly denied, however, that any such demonstrations were made in his presence (principal opinion, p. 5; Tr. 213, 243, 244, 270).

The same witnesses are completely at odds on the status of the work upon Mr. Pauley's arrival at the area between Stations 255+50 and 261+50 on the afternoon of May 28, 1964. There is no dispute that by the time of his arrival the overburden had been removed and that Mr. Lamb pointed to a hard substance exposed in the cut (affidavits of Messrs. Lamb and Blackmon, Exhibit No. 5; Tr. 86, 248). Mr. Pauley testified that when he arrived on the scene the rig of Walker Laboratories was completing the drilling of holes in the material and that the statement was made "We are just finishing up." (Tr. 212, 213.) In their affidavits of November 5, 1964 (Exhibit No. 5), Mr. Lamb and Mr. Blackmon give an entirely different sequence of events. According to their version the drilling by Walker Laboratories took place *after* Mr. Pauley had directed that the excavation proceed following his witnessing the unsuccessful attempts to remove the hard material by power equipment alone and his refusal to make cross-sections of the disputed area.

In determining the weight to be given to this conflicting evidence, the application of established legal principles clearly favors the acceptance of Mr. Pauley's testimony as the more credible. The statements made by Mr. Lamb in his affidavit of November 5, 1964 are not to be equated, of course, with the statements made by Mr. Pauley from the witness stand (note 3 *supra*). Of paramount importance in evaluating the testimony of Mr. Pauley and of Mr. Blackmon is the fact that throughout his testimony Mr. Pauley constantly referred to a daily diary maintained by him in which were recorded the important events of the

had no experience in taking a cross-section (Tr. 125). That the cross-sections made by Mr. Kean accurately portray the data reflected in the field notes of Mr. Lamb is dependent, at least in part, upon the latter's affidavit of November 5, 1964 (Exhibit No. 5), which contains a statement to that effect.

work week (Tr. 214, 247, 293).⁵ Mr. Blackmon's testimony was given without the aid of recourse to any notes reflecting information recorded contemporaneously with the events as to which he testified. He frankly acknowledged that his memory was dim as to many details (Tr. 126, 128). Mr. Blackmon's affidavit of November 5, 1964 (Exhibit No. 5) was prepared five months after the events described therein.⁶ Even according to his affidavit, however, Mr. Blackmon was only a witness to and not a participant in the conversation between Messrs. Lamb and Pauley pertaining to the cross-sections. While directly involved in the attempts to rip the material, it is at least doubtful whether, after so long a time, Mr. Blackmon was in a position to testify as to the presence or absence of Mr. Pauley when such attempts were made. His own actions in failing to preserve the ripper teeth which allegedly broke or curled up from the heat in the attempt to rip the material (Tr. 95, 111, 112) would not suggest that he then considered the parties were in a controversy.

Mr. Pauley was conscientious about other matters. He promptly reported to his superiors the events that had occurred on the job.⁷ Having undertaken to report so much of the matter (note 7 *supra*), no reason is perceived for Mr. Pauley not also reporting (i) any attempts made to remove the hard material witnessed by him, and (ii) that he had been requested to make cross-sections of the disputed area, if these events had in fact occurred.

For the reasons stated and taking into account the demeanor of the witnesses on the stand, we conclude that the testimony of Mr. Otis Pauley is worthy of belief and accept the same as determinative of the controverted questions to which we have previously referred.

Background of Claim

Resolution of disputed questions of fact is not the only difficulty that the case presents. Assuming that the material encountered was rock, the appellant's conduct during the crucial period (May 27 to June 5, 1964) and for almost three months thereafter is inexplicable. There is no dispute as to the fact that on May 28, 1964, Mr. Pauley denied that the hard substance shown to him was rock in the sense of the contract

⁵ The detailed nature of the entries are illustrated by several quotations from Mr. Pauley's diary in the Findings of Fact of April 20, 1965 (Exhibit No. 1).

⁶ The same is true of Mr. Lamb's affidavit of the same date (Exhibit No. 5).

⁷ On May 29, 1964 (the day after the conversations with Mr. Lamb respecting rock), Mr. Pauley reported for work in the Atlanta office of the Regional Engineer. Some time during the course of that day he narrated to Mr. Billy Horton, Regional Engineer, the statement Mr. Lamb had made concerning rock and the fact that the Walker Laboratories' rig had drilled holes in the area in question preparatory to blasting (Tr. 247, 264).

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(principal opinion, note 3) ; nor is there any dispute as to the fact that the contractor had drilled some holes in the area in question preparatory to blasting.⁸ Mr. Pauley viewed the blasting, however, as simply an aid to excavating with the equipment that the contractor had on the job (Tr. 234). The report made by Walker Laboratories at the time is consistent with this view of the matter (principal opinion, note 11). If the appellant's superintendent was dissatisfied with Mr. Pauley's determination that the hard substance shown to him was not rock as defined in the contract, there is nothing to indicate that the latter was made aware of such dissatisfaction. There is, for example, no evidence from any source that Mr. Pauley was informed of an intention on the appellant's part to proceed with its own cross-sections if, as has been alleged by the appellant, Mr. Pauley refused to make them.

The appellant has sought to show that Mr. Pauley acted irresponsibly in not making more than a visual examination of the hard substance shown to him on May 28, 1964 (Tr. 256, 257). Mr. Pauley's actions are consistent, however, with his view that Mr. Lamb was jesting when he inquired "Don't you think you should pay me rock for this?" (Tr. 212.) Irrespective of whether Mr. Pauley was correct in this appraisal, the normal interpretation of the events described would be that the appellant's personnel on the scene were acquiescing in Mr. Pauley's determination that the substance was not, in fact, rock in the sense of the contract and were proceeding with the excavation on the expectation of being paid the rate bid by the appellant for grading and common excavation of \$.20 per cubic yard (Exhibit No. 6) rather than the rate for rock excavation of \$10 per cubic yard (principal opinion, note 4).

It was almost three months before Mr. Pauley was disabused of the idea that Mr. Lamb's request for rock payment had been made in jest. Although Mr. Pauley returned to the job site on June 1, 1964 (Findings, p. 9, Exhibit No. I), no effort appears to have been made to show him excavated material or to otherwise renew the conversation respecting rock. In clear violation of the terms of the contract (assuming the substance was, as the contractor contends, rock), the excavated material from the disputed area was used as fill upon the instructions of

⁸ The appellant's claim for rock covers the area between Stations 255+50 and 261+50. Mr. Pauley testified, however, that the only drilling he observed on May 28, 1964, was in the general area of Stations 258 and 259 (Tr. 213, 266, 267), and that while he was talking to Mr. Lamb the rig completed the drilling and moved off the site (Tr. 268). This is consistent with Mr. Pauley's statement as to the status of the drilling when he arrived on the site (Tr. 212, 213). Queried by appellant's counsel Mr. Pauley acknowledge that he did not know how many holes might have been drilled in addition to those he saw and that he could not say whether the drilling rig left McBee (Tr. 268). Walker Laboratories Report No. B-18617 dated May 29, 1964 (Exhibit No. 5), does not show the stations at which the drilling was performed.

appellant's superintendent (principal opinion, note 18). This action apparently took place when neither Mr. Pauley nor any other Government representative was on the job (Tr. 126). Apparently no efforts were made at that time to preserve samples of the materials actually excavated from the roadbed between Stations 255+50 and 261+50. Sample No. 1 and Sample No. 2,⁹ representing samples purportedly obtained from that area, were not procured until September 8, 1964 (affidavit of William M. Kean; Exhibit No. 5).

The conduct of appellant's president is marked by the same sort of inconsistency. During the time when he had many telephone conversations with Mr. Lamb concerning the hard substance claimed to be rock in which the latter was specifically instructed as to the course of action to be followed (Tr. 182, 183), Mr. Kean made no effort to communicate directly with Mr. Pauley (Tr. 183, 194, 195); nor did he see fit to contact either Mr. Pauley's superiors in the office of the Regional Engineer (Tr. 194, 195) or the contracting officer (Tr. 183, 184) at a time when an effective investigation could have been launched both as to the nature of the substance encountered and the amount involved. Mr. Kean explains these failures on the basis that he was involved with other business of even greater importance to him (Tr. 194, 195) and he could not afford to have the work delayed while awaiting action on correspondence (Tr. 193, 194).

Viewed in the perspective of Mr. Kean's conduct in reference to other matters throughout the course of contract performance, neither of the explanations offered are convincing. There is nothing in the record to indicate that a question involving rock payment would have been handled by correspondence. According to the uncontradicted testimony of Mr. James A. Taylor, Assistant Regional Engineer and Mr. Pauley's immediate superior, the appellant's personnel frequently contacted him by telephone (Tr. 283). Problems arising on the job at a time when no Government representative was present on the sight were promptly investigated by the dispatch of a Government engineer to the job site (Tr. 210). It is noteworthy that Mr. Kean did not accept Mr. Pauley's decision as representing the last word of the Government in other situations but rather sought the intervention of his superiors (Tr. 221, 222, 250, 268-270).

No satisfactory explanation was offered by appellant's president as to his course of action in reference to pay estimates. Although the field notes from Mr. Lamb were turned over to him on June 5, 1964 (Affidavit of William M. Kean, Exhibit No. 5; Tr. 139, 140), he made no

⁹ Appellant's Exhibit No. 1 represented a portion of Sample No. 2 (Tr. 17).

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effort to secure recognition of the rock claim in question prior to his discussions with Mr. Pauley in reference to the pay estimate for the month of August 1964 (Findings, p. 9, Exhibit No. 1). Paradoxically, Mr. Kean did not apprise the contracting officer of his claim for rock excavation at the time of their conference on July 9, 1964 (Government Exhibit "C", Tr. 179, 324, 326); nor did he bring the matter up for discussion during the conversations held with the contracting officer, Mr. Taylor and others at the job site on July 16, 1964, even though such conversations lasted for several hours (Tr. 272, 273, 288, 321, 323).

Some time in mid-August of 1964 Mr. Taylor agreed that a hard substance encountered in the side ditch at Station 160+00 should be paid for as rock (Finding, p. 9, Exhibit No. 1, Tr. 162, 280). In the Government's view this decision was reached not because the substance encountered there was rock in the sense of the contract. Rather, the Government considered that it would be more economical from its standpoint to have the contractor blast this material and allow rock payment than it would be to pay for rebuilding the entire side of the roadway section, which would have been required if normal operation of heavy road grading equipment was permitted in the area (Finding, p. 8, Exhibit No. 1; Tr. 280). These considerations obviously did not apply to the hard substance encountered between Stations 255+50 and 261+50 where all of the claimed rock was excavated in the course of constructing the roadway itself. Another significant difference is that rock payment authorized in connection with the ditchline involved only 40 cubic yards of excavation as contrasted with the appellant's present claim of 2,769.41 cubic yards. Nevertheless, the appellant appears to have seized upon Mr. Taylor's decision relating to the ditchline as also applicable to the hard substance encountered between Stations 255+50 and 261+50. Almost immediately Mr. Kean raised the question of rock payment for excavation in the latter area with Mr. Pauley (Finding, p. 9, Exhibit No. 1) without even waiting to prepare cross-sections from the field notes submitted by Mr. Lamb over two months before (affidavit of William Kean, Exhibit No. 5; Tr. 155).¹⁰

There was evidence besides that offered by the Government personnel concerned which seriously impugned appellant's claim of rock excavation between Stations 255+50 and 261+50. After making eight soil test borings and six auger borings in the area in question, the Law

¹⁰ Apparently this accounts for the claim submitted in connection with the August estimate having involved 1,666 cubic yards of purported rock excavation as contrasted with the present claim of 2,769.41 cubic yards. (Findings, p. 9, Exhibit No. 1.)

Engineering Testing Company concluded that no materials that could be designated as rock in the engineering sense had been encountered and that no rock was evident from visual examination of the surface of the site (principal opinion, pp. 14, 15; Report of November 17, 1964, Exhibit No. 5).

Crucial to the Board's finding that rock had been encountered in the disputed area was the expert testimony of Dr. Bruce W. Nelson, Head, Department of Geology, University of South Carolina (principal opinion, pp. 12-18). According to Dr. Nelson there was a rock ledge, occurring below elevations of 335 feet (report of May 14, 1965, Exhibit No. 2), which was seven to eight feet in thickness and had once extended into the roadbed between Stations 255+50 and 261+50 but which had been completely removed by the appellant in constructing the road (report of May 14, 1965, Exhibit No. 2; Tr. 23, 27, 41). Dr. Nelson's testimony was based in part upon two borings made by Walker Laboratories in the original ground adjacent to the roadway at Stations 259 and 260 at the time of Dr. Nelson's on site geologic investigation of May 10, 1965 (Tr. 34, 40, 41, 47). He regarded the results of his May 10 investigation and the findings of Walker Laboratories as set forth in its report of May 17, 1965 (Exhibit No. 4) as corroborative of the conclusions expressed in his earlier report of November 27, 1964 (Exhibit No. 5) concerning an earlier on site geologic examination by him on November 14, 1964 (report of May 14, 1965; Exhibit No. 2; Tr. 41).

In direct examination Dr. Nelson testified that the rock ledge had extended from the road surface upward for seven or eight feet (Tr. 23-24). This was contrary to the statement in his report of May 14, 1965 (Exhibit No. 2) that "the borings and tests confirm the existence of a hard rock ledge of 7-8 feet thickness extending from about 3½ feet above the finished road bed to about 3½ feet below it." Queried about this contradiction upon cross examination, Dr. Nelson unequivocally adopted the quoted statement from his report of May 14, 1965 and illustrated the correctness of this view by referring to a sketch he had prepared in the field on May 10, 1965 (Appellant's Exhibit No. 7) at the time of his second visit to the site (Tr. 37-39). Dr. Nelson also testified that the appellant had excavated below the road level (Tr. 38). This testimony was based upon information received from Mr. Kean that the appellant had excavated the cut about 3 to 3½ feet below the finished asphalt surface (Tr. 50, 51). Dr. Nelson made clear, however, that his view of a continuous rock ledge having once extended into the roadbed could be reconciled with the findings of Law Engineering Testing Company (principal opinion, pp. 14, 15) only if the appellant

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did, in fact, excavate from 3 to 3½ feet below the road level (Tr. 38, 50, 51). No effort was made by Mr. Kean in his subsequent testimony to show that Dr. Nelson had misunderstood him or that Dr. Nelson's testimony was otherwise incorrect in this respect. That the appellant did excavate approximately 3 feet below the level of the road is corroborated by the testimony of the appellant's grading foreman (principal opinion, note 16).¹¹

The Government's witness Taylor vigorously attacked Dr. Nelson's conclusion that a rock ledge had extended into the roadbed on the principal ground that if it had Law Engineering would surely have encountered it in its numerous test borings of the disputed area ranging in depth from four to six feet (Report of November 17, 1964, Exhibit No. 5; Tr. 74, 283, 284). Mr. Taylor acknowledged, however, that some rock could have been present in the area without being revealed by Law Engineering's test borings if it were intermittent as contrasted with Dr. Nelson's view that it was continuous (Tr. 284) or if the appellant had in fact excavated from 3 to 3½ feet below the level of the road (Tr. 301). Mr. Taylor noted that if the rock ledge were intermittent it would have the effect of reducing the amount of rock present in the disputed area (Tr. 285). He also noted that any rock excavated by the appellant below the roadbed would represent volunteer work (principal opinion, note 21).

Appellant's Contentions

The appellant having urged the Board to accept the testimony of Dr. Nelson¹² attempts in its motion to denigrate such testimony in a number of important respects. In an apparent effort to overturn the Board's finding that the bulk of the rock excavated was below the subgrade for which the contract provides no reimbursement (principal opinion, p. 25, notes 1 and 21), it calls attention to the testimony of Dr. Nelson previously mentioned in which the rock ledge was described as extending from seven to eight feet above the road surface (Tr. 23, 24). There is, however, no reason for the Board to give any weight to testimony

¹¹ At page 14 of its brief appellant states: "As noted by Mr. Blackmon (Tr. 98), a water problem was encountered at the grade level of the roadway and excavation some three feet below grade level and back-filling with select material was necessary. * * *"

¹² The significance that the appellant attached to Dr. Nelson's testimony is well illustrated by the following statement from page 7 of its brief: "Dr. Bruce W. Nelson, eminently qualified geologist and head of the Department of Geology at the University of South Carolina, stated at the hearing (Tr. 19) 'Professionally we would designate these samples as rock material, silt stone in the technical definition of that word.' Considering the source from which this statement comes, appellant probably should stop at this point and rest its case, especially in view of the fact that Government engineer Pauley finally admits that the substance involved was rock in the geological sense." (Tr. 265.)

that the party offering it has elected not to stand upon, particularly where, as here, the repudiation is amply supported by written reports and sketches made prior to the hearing and affirmed as accurate upon cross-examination (Tr. 37-39).

The assertion that the Board used speculation and hindsight in determining the "pay" quantity of rock has no greater merit. The cross-section prepared by the appellant contained no elevations, even though the contract contemplated that elevations would be provided (principal opinion, p. 11) and even though, as we have found, the appellant usurped the Government's function in preparing the cross-sections without having made a request upon the Government to do so. The Board's determinations were based upon the evidence of record and particularly upon the testimony of Dr. Nelson as corroborated in part by the testimony of the appellant's grading foreman Mr. Blackmon (principal opinion, note 16), as well as upon the failure of Mr. Kean in his testimony to contradict statements previously made from the witness stand by Dr. Nelson in his presence.

Appellant's counsel calls attention to testimony in which Mr. Kean attempts to de-emphasize the importance of elevations to Dr. Nelson's findings (Tr. 184-190). It is sufficient to note (i) that this view is completely at variance with Dr. Nelson's expert opinion (Tr. 33, 46, 52, 53);¹³ and (ii) that without elevations being assigned to appellant's cross-sections, it is not possible to relate them to other evidence in the case including that offered by the appellant (Tr. 285, 302, 303).

The appellant also points out that Dr. Nelson took borings at only two stations. This is true but it is clear that Dr. Nelson also placed great reliance upon the visual examinations he made of the entire cut on both sides of the roadway and his observation of rock formations in the surrounding area (report of May 14, 1965, Exhibit No. 2; report of November 27, 1964, Exhibit No. 5; Tr. 41). Obviously Dr. Nelson considered that the two test borings and such visual observations together constituted a sufficient basis for an expert opinion as to the probable rock formation which had been present in the roadbed prior to the excavation (Tr. 37-41). The Board accepted Dr. Nelson's testimony and the appellant is in no position to, in effect, impeach its own witness because some of the testimony offered and accepted is no longer regarded as favorable.

The appellant refers to the on site inspection as having shown quite vividly that there was a great quantity of rock in both sides of the

¹³ The following colloquy on cross-examination reveals the importance Dr. Nelson ascribed to elevations (Tr. 46): "[Q] And you only located this particular hard substance in three different areas. [A] That is correct, and they are very critically located from the standpoint of elevation and the stratification of the rocks in that region, as my technical reports have shown and as we have testified earlier today."

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cut above the finished roadway and avers that a great deal more rock was visible at the site (contending also that this rock once existed in the cut). A detailed discussion of the results of the on site inspection would appear to serve no useful purpose. At no time did Dr. Nelson suggest that the remnants of rock which he stated were visible on the slopes occurred at a different elevation than that to which he had testified previously that morning. Some two miles from the roadbed an outcropping of rock was clearly in view. The outcropping, however, was clearly discontinuous as it was in the immediate vicinity of a gravel pit in which there was no evidence of rock having occurred at the same elevation (Tr. 201, 202). The inconclusive nature of the site visit is well illustrated by the fact that the following day the appellant offered in evidence a sample of rock (Appellant's Exhibit No. 11) taken from an area estimated to be 2 miles from the job site (Tr. 150-152) but none from the great quantity of rock alleged to be visible at the site.¹⁴

Rock Excavation Performed as Volunteer

In an effort to avoid the consequences of having excavated a large quantity of rock for which the contract makes no provision for payment, the appellant asserts that any rock excavation performed below subgrade was either done at the specific direction of the Government or with its full knowledge and acquiescence. According to the appellant's counsel the Government engineer at the site, the Assistant Regional Engineer and the contracting officer all admit that there was a water problem, that they knew about it, and that the contractor was instructed to raise the elevation and to backfill with select material.

The appeal record, however, is entirely devoid of evidence to show that during the period in question (May 27 to June 5, 1964) the Government was chargeable with knowledge of a water problem or was involved in any way in the contractor's decision to proceed in the manner that it did. None of the appellant's witnesses so testified. Government witness Pauley specifically denied any knowledge at that time of a water problem between Stations 255+50 and 261+50 (Tr.

¹⁴ The friable nature of some of the material purportedly representing remnants of the rock ledge visible at the site may have been due to the effect of weather (over 15 months elapsed between the time the excavation was completed and the date of the site visit). The effect of weather upon the hard substance encountered in the area in question was discussed in Dr. Nelson's report of November 27, 1964 (Exhibit No. 5). It is to be noted, however, that the Law Engineering Testing Company did not consider that any rock was visible from a surface examination of the site when the test borings reported in its letter of November 17, 1964 (Exhibit No. 5) were made (principal opinion, note 47).

252). He acknowledged that a humping problem later developed in this portion of the roadway due to the presence of excess moisture (Tr. 272, 273) and that at a meeting held on the job site on July 16, 1964, in which the contracting officer and Messrs. Horton, Taylor, Pauley and Kean all participated, the latter was instructed to take action designed to overcome the humping problem (Tr. 253, 254). Government witness Taylor related his testimony to the same meeting (Tr. 302) as did the contracting officer (Tr. 321-323).

The contractor was on notice that no one other than the contracting officer had authority to make changes in the terms of the contract. Notice to this effect was given at the pre-construction conference (Tr. 324, 325). The limitations upon the authority of Government representatives other than the contracting officer were underscored in an episode involving a Government engineer assigned to the job (Tr. 308). There is no reason to doubt that the contractor fully understood that only the contracting officer had authority to make changes in the contract, which he was not given an opportunity to do in this case.

In the absence of any evidence showing or tending to show that the Government participated in any way in the contractor's decision to excavate below the subgrade and taking into account the testimony of Dr. Nelson that the rock ledge extended $3\frac{1}{2}$ feet below the finished roadbed, as well as his uncontradicted testimony that Mr. Kean had informed him that the excavation had occurred to that depth, the Board concluded that only 548.91 cubic yards of the excavation depicted on appellant's cross-sections represented rock occurring above the subgrade. The Board then determined that the contractor was entitled to payment for that quantity at \$10 per cubic yard, as specified in the contract (principal opinion, p. 25, notes 1 and 4). As to the balance of the claim for rock excavation the Board concluded that in proceeding with the work below subgrade without consulting with the Government or affording it an opportunity to determine what course of action should be followed with respect to any water problem that may have existed, the contractor was performing work on its own volition for which the contract makes no provision for payment. In refusing to recognize any claim for work performed in such circumstances, the Board was adhering to a well-established rule which both the courts¹⁵ and the boards¹⁶ have consistently followed. In *The Woodcraft Corporation v. United States* (note 15 *supra*), the court stated the rationale for the rule in the following terms at page 103:

¹⁵ *The Woodcraft Corporation v. United States*, 146 Ct. Cl. 101 (1959).

¹⁶ *Chester Barrett, d/b/a The American Tank Company*, IBCA-429-3-64 (April 7, 1966), on motion for reconsideration, 66-1 BCA par. 5503, and cases cited.

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"As the plaintiff must admit, the additional costs were *ultra contractum*. Therefore, to win their recovery some extrinsic promise, implied or express, must be shown, such as an involuntary and compelled compliance, an allowed extra or a change in the contract. But an expenditure could not be involuntary and compelled without a previous protest to the contracting officer; *J. A. Ross & Company v. United States*, 126 Ct. Cl. 323, 329 (1953); and under the contract he alone could bind the defendant to an extra or a change. * * *

Decision

In its earlier decision the Board noted some but not all of the contradictions in the appellant's evidence to which we have referred in the course of this opinion. It found nonetheless that there was sufficient credible evidence before the Board to warrant a determination that a quantity of rock was excavated for which payment should be made (principal opinion, p. 22). Besides the evidence specifically relied upon by the Board in the earlier decision, we note that the Government engineer primarily concerned with the project acknowledged that there were few fissures in the hard substance shown to him on May 28, 1964 (Tr. 234), and that the substance removed by blasting from the ditchline for which rock payment was authorized was similar to the type of material introduced into evidence by the appellant at the hearing (Tr. 266).

The appellant asks rhetorically how the Board can defeat the only evidence of quantity based on actual field measurements by speculation and assumption and reconstruction made only in hindsight. The short answer to this is that this problem is entirely of the appellant's choosing. If the claim had been presented in a timely manner, it could have been promptly investigated by the Government personnel concerned. Rather, for almost three months the appellant chose not to present a question to Mr. Pauley's superior which, if favorably resolved, would entail an increase of 5,000 percent over the amount otherwise payable in accordance with its bid price.

After careful consideration of the entire record, we conclude that the appellant has failed to show that our earlier decision should be modified in any respect. Accordingly, appellant's motion for reconsideration of our decision of November 9, 1966 is hereby denied.

WILLIAM F. MCGRAW, *Member*.

WE CONCUR:

DEAN F. RATZMAN, *Chairman*.

ARTHUR O. ALLEN, *Alternate Member*.

LAWRENCE EDWARDS

A-30696

A-30705

*Decided April 21, 1967***Grazing Permits and Licenses: Cancellation and Reductions—Grazing Permits and Licenses: Range Surveys**

On remand of a case involving the award of grazing privileges on an annual basis, the applicant can introduce evidence to show that the grazing capacity of the range has improved since the date of the range survey on which the contested award was made; however, a reduction in grazing privileges based on a range survey will not be changed unless the applicant can demonstrate why or in what way the range survey was in error.

Grazing Permits and Licenses: Generally

Where lands which become additionally available for disposition of grazing privileges consist of isolated tracts of small carrying capacity, the limited grazing privileges will be disposed of on the basis of good range practice and past usage in accordance with a provision of the Range Code rather than on a standard of customary use fixed by a State Director where application of the standard is fruitless in view of use of the tracts under allegedly invalid subleases or transfers.

APPEALS FROM THE BUREAU OF LAND MANAGEMENT

Lawrence Edwards has appealed to the Secretary of the Interior from a decision dated June 28, 1966, of the Acting Chief, Office of Appeals and Hearings, Bureau of Land Management, which affirmed so much of a decision of a hearing examiner as sustained a reduction of his grazing privileges and set aside and remanded so much of that decision as awarded him grazing privileges on lands recently made available for administration by the Bureau of Land Management pursuant to the Taylor Grazing Act, 43 U.S.C. Sec. 315 *et seq.* (1964). Bert B. Boughton and Francis L. Henning, holders of grazing privileges in the area under consideration, intervened in the proceedings below but have not appealed from the Acting Chief's decision.

This case is a continuation of one previously before the Department as a result of an effort by the district manager, Miles City, Montana, to effect a 24 percent reduction in grazing privileges found necessary to conform the qualified demand of the West Side Area of the Big Dry Grazing Unit to the grazing capacity of the area in accordance with the results of a range survey.

When the earlier proceedings came before it, the Department held that the reduction had been made under a provision of the range code (43 CFR, 1960 Supp., 161.6(f), now 43 CFR 4111.4-3(a)) re-

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quiring that regular licenses and permits properly issued be reduced on an equal percentage basis and that the appellant had not been notified of an additional reduction of his privileges in excess of 24 percent or of the basis for it. Accordingly, the Department set aside the decision of the Director insofar as it reduced appellant's grazing privileges by more than 24 percent and remanded the case for further action if his grazing privileges were to be reduced by more than 24 percent *Lawrence Edwards*, 69 I.D. 95 (1962).

This appeal arises from the district manager's decisions of March 11, 1963, and February 11, 1964, in which he attempted to meet the terms of the Department's decision.

The Department had first held that the appellant had not shown that the reduction of 24 percent was improper and that evidence that the appellant had continued to graze the same number of cattle as he had previously grazed and that a grazing trespass had been committed in the area did not prove that the range had the capacity to sustain without injury the amount of grazing previously permitted or that a reduction in the amount was improper. It went on to point out that the appellant and his brother, King Edwards, derived their grazing privileges from the original operation of Mrs. George Edwards and Sons, which in the area in question was entitled to 846 animal unit months (AUM's) of Federal range use, that the actual use in the years immediately preceding the manager's decision had been 796 AUM's, of which the appellant had used 580 in his cattle operation and his brother had used 216 for sheep and horses, that the two operations were separate and that the appellant had operated as an individual. It then found that allowing the appellant only 348 AUM's constituted a 40 percent reduction in his use and that the proposed allocation of 301 AUM's to King Edwards, while resulting in a total 24 percent reduction on the brothers' combined use was, in effect, a 40 percent increase to King Edwards over his prior use in the area.

Upon remand the manager apparently decided not to attempt to sustain the propriety of his first division of the Edwards' privileges but instead applied the 24 percent reduction to the privileges that each of them had been authorized to use separately. He concluded that the appellant was entitled to 72.86 percent of the original grazing privileges or 468 AUM's and that his brother should receive the remaining 27.14 percent or 175 AUM's.

On appeal to the hearing examiner, the appellant contended that no reduction at all should be imposed on his grazing privileges and that the Department's decision did not preclude him from offering

evidence to support this contention. Over the objection of the Bureau (Tr. 24-28), the hearing examiner permitted him to introduce such evidence as he had, which consisted of arguments similar to those presented at the first hearing, *i.e.*, that his use of the range at his previously established rate and the good condition of the range and his cattle under such use demonstrated that the range could carry more than what the range survey showed. The hearing examiner held that the issue had been disposed of by the Department's first decision and that in any event the evidence did not show why or in what way the range survey was in error or what the carrying capacity of the area should be.

Such evidence is necessary before a determination of grazing capacity will be made. *N. J. Meagher and Company et al.*, A-30612 (December 12, 1966); *Melvin Adams*, A-30406 (November 1, 1965).¹ We concur in the hearing examiner's conclusion that the appellant's evidence does not demonstrate error in the determination of the carrying capacity of the range as shown in the range survey upon which the district manager relied in awarding grazing privileges.²

The second issue in the appeal concerns the disposition of grazing privileges on part of one and all of three disconnected tracts, lying along the shoreline of the Fort Peck reservoir, which were transferred in 1962 from the Department of Defense to the Department of the Interior for the purpose of administering them for grazing (Tr. 54). The grazing capacity of the tracts is as follows: No. 398—27 AUM's;³ No. 452—12 AUM's; No. 518—7 AUM's; and No. 520—14 AUM's (Tr. 52-55). The district manager awarded tracts 518, 520, and 452 to Henning, the hearing examiner found they should go to Lawrence Edwards, and the Acting Chief held that a hearing was necessary to

¹ This conclusion makes it unnecessary to decide whether the introduction of evidence bearing on the grazing capacity of the range should have been permitted. However, it is our view that the evidence was properly admitted. The licenses issued appellant and other cattle and sheep operators were issued annually. Thus, there is the possibility that the condition of the range may have changed so that a range survey made in 1954 would no longer be valid in 1967. While a licensee cannot relitigate issues that have been settled in prior proceedings, 43 CFR 1853.1(d), he ought always to be allowed to show what current conditions are and how they affect his rights to grazing privileges.

² We may note that appellant's argument that his continued use of the range at his previously authorized rate shows that the range can handle such use ignores the fact that other users have been operating with a 24 percent reduced rate. Also, it ignores his own testimony that there is forage available between the high and low water marks of the Fort Peck reservoir which is used by the livestock but is not included in the area of the range survey (Tr. 126-128; 96-99). The availability of this forage would fluctuate with the water level.

³ Edwards and Henning have agreed that neither has any interest in the larger portion of tract 398, 201 acres, which is separated by an arm of the reservoir from the smaller portion of it, 43 acres, adjoining their grazing area. The larger portion is the area which Boughton wants to lease.

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determine who should have them. The available portion of tract 398 has apparently not been awarded at all (Tr. 52-54), but the examiner concluded that it should be awarded to the appellant.

The pertinent regulation provides:

* * * Any land within the exterior boundaries of a grazing district made available for administration by the Bureau of Land Management * * *, after the grazing privileges in the area embracing the land have been adjudicated, will be administered in accordance with customary use so far as such administration may be practicable and consistent with good range management. 43 CFR 4111.3-2(d) (1).

The State Director in a memorandum dated May 5, 1961 (Exhibit G-2), instructed the 3 district managers in whose districts tracts such as these were situated to award grazing privileges to those who had leased them from the Corps of Engineers under one year leases terminating February 28, 1961. It appears that tract 452 was leased to King Edwards in 1960-1961 while tracts 518 and 520 were leased to Minnie King. Lawrence Edwards claims that he used the three tracts in the crucial year under sublease from or agreement with the lessees. Henning contends that as part of his purchase of the King ranch in January 1960, the Kings (Minnie and Kenneth) assigned to him the preference to have grazing privileges in tracts 518 and 520. He says that Lawrence Edwards' use cannot be recognized because it was made without the consent of the lessor, which is required under section 6 of the lease before the lessee can transfer, assign, sublet or grant any interest in the premises. As the hearing examiner pointed out, there is some question that a use for one grazing season would constitute "customary use" within the meaning of the regulation. It is not, however, necessary to decide that issue since it does not seem relevant here. If Lawrence Edwards does not qualify because his sublessors did not obtain approval of the sublease to him, it would seem that Henning is equally disqualified because he has offered no evidence that the lessor consented to the transfer of the leases to him, assuming that they were conveyed to him as part of the sale of the King ranch.

Furthermore, the amount of grazing privileges to be disposed of is quite small—33 AUM's on the three whole tracts plus perhaps 4 on the partial tract. The appellant and Henning appear to be the only ones concerned. It would seem that in the circumstances an allocation on the basis of good range practices would be preferable to attempting to distribute the privileges on an analysis of either the legality of the subleases or the haphazard use in one year when apparently actual use has been made in prior years by all those who had

privileges in the area (Tr. 104-105). In fact, an attempt to apply the one-year customary use standard fixed in the State Director's memorandum of May 5, 1961, would lead nowhere if it is assumed that the subleases to appellant and the transfer to Hennings cannot be considered because they were not approved. The memorandum establishes "customary use" as "that use made by the livestock operations of the lessee whose [one-year] lease terminated February 28, 1961." Where the lessee sublet his leased area during that year, he obviously had no livestock operation on the land which could establish a "customary use." The only livestock operation during the period would have to be that of the sublessee or transferee, but if his operations cannot be considered because the sublease or transfer was not approved, then there was no customary use within the purview of the State Director's memorandum. In the circumstances, the use to be made of the land would have to be determined in accordance with the general language of the applicable regulation quoted earlier. That regulation, it will be noted, provides for disposal in accordance with customary use only where it will "be practical and consistent with good range management." Therefore, the Acting Chief's direction that the case be remanded for a hearing on the issue of customary use is set aside.

On the basis of prior use by the King Ranch, now held by Henning, and the location of the tracts it is concluded that tracts 518 and 520 should be, and they are awarded to Henning while the grazing privileges on tract 452 and the disputed portion of tract 398 are awarded to Lawrence Edwards.

Lawrence Edwards has also appealed to the Secretary of the Interior from a decision dated July 13, 1966, of the Acting Chief, Office of Appeals and Hearings, Bureau of Land Management, affirming the dismissal by a hearing examiner of his appeal from a decision of the range manager, dated January 24, 1966, and supplemented February 3, 1966, denying his application for grazing privileges for the 1966 season.

The allocation to Edwards was the same as that made in prior years, which was the subject of the appeal just discussed. Edwards says that his appeal is based on the same issues involved in the first appeal and is made to keep the issues alive and to prevent his claims from becoming moot. His appeal was dismissed on the grounds that it raises only issues which were adjudicated in a proceeding involving the same privileges, parties, and base property. The district manager allowed Edwards 580 AUM's, but pointed out that this amount was in excess of the grazing capacity of the Federal range to be used but was allowed pending final disposition of his earlier appeal.

We need not now consider whether appellant was required to appeal from the district manager's decision to protect his pending appeal from a similar decision for a prior year. Edwards relies upon the same grounds in this appeal as he did in the earlier one, and his contentions have been carefully considered in the first part of this decision. The year for which he has appealed is past and the issues moot as to that year. Future applications will be adjudicated in light of this decision. The appeal is considered as having been combined with the first one and is disposed of in the same way.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a) ; 24 F.R. 1348), the decision of the Bureau of Land Management dated June 27, 1966, is affirmed in part and reversed in part and its decision of July 13, 1966, is vacated.

ERNEST F. HOM,
Assistant Solicitor.

LESTER J. HAMEL

A-30745

Decided May 8, 1967

Color or Claim of Title: Generally—Words and Phrases

A color of title claim cannot be initiated on land withdrawn pursuant to a statute granting land in aid of construction of a railroad; such land is not "public land" within the meaning of the Color of Title Act.

Color or Claim of Title: Good Faith

Land ceases to be held in good faith in peaceful adverse possession under the Color of Title Act when the holder learns that he does not have title to the land.

Railroad Grant Lands

Legal title, although not record title, to granted lands passes to a railroad under a railroad land grant act upon the filing of a map of definite location of the railroad and such title is subject to divestiture by adverse possession under state laws prior to the issuance of patent to the granted lands.

Railroad Grant Lands

Where a railroad has lost title to granted but unpatented lands as a result of adverse possession, a release filed by the railroad pursuant to the Transportation Act of 1940 reconveys or relinquishes nothing to the United States.

Railroad Grant Lands

Although the title of a railroad to unpatented granted land may have been extinguished by adverse possession, the Department has no authority in the absence of legislation to issue a patent to the land to the adverse possessor.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Lester J. Hamel has appealed to the Secretary of the Interior from a decision dated September 21, 1966, by the Acting Chief, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of the Sacramento land office rejecting his class 1 claim under the Color of Title Act, as amended, 43 U.S.C. §§ 1068-1068b (1964), for lot 9, sec. 15, T. 8 N., N. 2 E., M.D.M.¹

Section 1 of the act, as amended, 43 U.S.C. § 1068 (1964), provides in pertinent part as follows:

* * * the Secretary of the Interior (a) shall, whenever it shall be shown to his satisfaction that a tract of public land has been held in good faith and in peaceful, adverse, possession by a claimant, his ancestors or grantors, under claim or color of title for more than twenty years * * * issue a patent * * *.

In his application, which was filed on March 23, 1964, Hamel traced his chain of title back to a deed to a predecessor which was executed on September 15, 1919. He stated that he first learned that he did not have title to the land on April 13, 1959.

The land office rejected his application in a decision dated April 22, 1966. The reason given was that pursuant to a letter dated December 23, 1864, from the Commissioner of the General Land Office to the register and receiver of the land office at Marysville, California, the entire township in which lot 9, section 15, is situated was withdrawn for the purposes of the act of July 1, 1862, 12 Stat. 489, as amended by the act of July 2, 1864, 13 Stat. 356. These statutes granted to the Central Pacific Railroad Company certain odd-numbered sections of land within certain limits on each side of a line of railroad to be built by the company across California. The statutes provided that the company must designate the general route of the road and file a map of it in the Department—

* * * whereupon the Secretary of the Interior shall cause the lands within twenty-five miles of said designated route or routes to be withdrawn from preemption, private entry, and sale * * *. 12 Stat. 493, 13 Stat. 358.

The withdrawal that was directed on December 23, 1864, was made pursuant to this provision.

The land office stated that title to lot 9, sec. 15, presumptively vested in the railroad when the road location was definitely fixed; however, no

¹ Hamel previously filed a class 2 claim under the same statute for the same land. It was finally rejected by a Departmental decision dated September 17, 1962 (A-28830). Hamel brought an action to have the decision reviewed, but the action was dismissed on the ground that action on class 2 claims is committed to the discretion of the Secretary and therefore is not subject to judicial review. *Hamel v. Nelson*, 226 F. Supp. 96 (N.D. Calif. 1963). The court contrasted action on class 1 claims, which the court characterized as mandatory.

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patent was ever issued to the railroad or any list or selection of the land by the railroad approved. Consequently, whatever interest the railroad had in the land was relinquished when it filed on October 28, 1940, a release pursuant to section 321 (b), Title III, of the Transportation Act of 1940, 49 U.S.C. § 65 (1964). The release was approved on December 28, 1940.

Subsequently, on April 14, 1953, the Secretary issued an order which, reciting that claims to certain described lands, including lot 9, sec. 15, within the limits of grants to certain railroads had been released, made the lands "available for disposal, use and management under the public land laws * * *" in accordance with a time schedule set forth in the order. 18 F.R. 2378.

The land office held that a valid color of title claim could be initiated only from December 28, 1940, when the railroad's release was approved, or from the times specified in the order of April 14, 1953, and that in either event, since Hamel learned that he did not have title on April 13, 1959, the 20-year period of adverse possession required by the Color of Title Act could not have elapsed. It therefore rejected Hamel's application for this reason.

In his appeal to the Director, Hamel questioned the conclusion that the Color of Title Act does not apply to railroad grant lands for which patent has never been requested by the railroad. He also questioned the assumption that the 20-year period must have run entirely after 1940 or 1953 and the relevance of his becoming aware in 1959 that the Government claimed the land. As an alternate ground, Hamel asserted that the railroad had acquired vested rights in the land which could not be defeated by inaction in the issuance of the patent to the company, that he and his predecessors extinguished the railroad's rights by adverse possession long before 1940, and that the release executed by the railroad in that year could not affect his rights.

In its decision, which is the subject of this appeal, the Office of Appeals and Hearings agreed that the railroad had rights to lot 9, sec. 15, prior to filing its release but held that it never had legal title, which at all times remained in the United States, and that all interests of the railroad reverted to the United States when the release was filed. The Office concluded that neither Hamel nor his predecessors could at any time have acquired the legal title to lot 9, sec. 15, by adverse possession.

The Office of Appeals and Hearings held, as to Hamel's claim under the Color of Title Act, that the act applies only to vacant, unappropriated public land, that the land in question was not public land when

Hamel's claim was initiated on September 15, 1919, having been withdrawn for railroad purposes, and that the land was not subject to the act until it was restored to public domain status by the order of April 14, 1953. It held too that the statute requires an adverse possession to be in good faith and that Hamel's good faith possession terminated when he learned on April 13, 1959, that title was in the United States.

In his current appeal Hamel incorporates the contentions he made on his prior appeal and emphasizes his contention that by his adverse possession he in effect stepped into the shoes of the railroad and is entitled to the issuance of a patent as a ministerial act.

Hamel's alternate contentions are, of course, inconsistent with each other. His argument as to adverse possession against the railroad amounts to an assertion that he is the successor in interest of the railroad and stands in the position that the railroad occupied prior to the filing of its release. The railroad's position at that time was that of a grantee of public land who had the right to have the grant confirmed by the issuance of a patent, and not that of a color of title claimant who has no rights other than those conferred by the Color of Title Act. The conditions for securing legal title under the railroad grant statutes and under the Color of Title Act were and are completely different.

This case originated with Hamel's filing a class 1 claim under the Color of Title Act and his successive appeals have been taken from the rejection of his claim. There is no question but that the rejection was proper since Hamel's claim clearly does not meet the requirements of the statute. The statute recognizes only a claim to a tract of "public land." The term "public land" as used in the statute does not include withdrawn land. See *Beaver v. United States*, 350 F. 2d 5, 10, 12 (9th Cir. 1965); *Solicitor's opinion*, 72 I.D. 409 (1965). The Department has held repeatedly that a color of title claim cannot be initiated on withdrawn land. *Claude M. Williams, Jr. et al.*, A-29928 (March 26, 1964), and the numerous cases therein cited. Since lot 9, sec. 15, had long been withdrawn for railroad purposes at the time when Hamel's predecessor first acquired color of title to the tract by virtue of the deed executed on September 15, 1919, a color of title claim could not be initiated until the land was restored to public land status.

The approval of the release filed by the Central Pacific Railroad Company pursuant to the Transportation Act of 1940 lifted the withdrawal of the lands released and restored them to the status of vacant, unappropriated public lands, subject only to other withdrawals *Earl Orecelouis Hall*, 58 I.D. 557 (1943); *Floyd Hamilton*, 60 I.D. 194 (1948). However, this did not automatically make them subject to disposal under the public land laws. They were not available for such

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disposal until some further step was taken. *Id.* Such action was not taken until the Secretary's order of April 14, 1953. There may be a question whether the initiation of a color of title claim must wait upon such action or can be made following approval of a release. However, it is not necessary to decide this question, for even if Hamel's claim could be considered as originating on December 28, 1940, he did not have the requisite 20 years of good faith adverse possession thereafter.

The Color of Title Act requires the holding of a tract of public land "in good faith" in peaceful adverse possession for more than 20 years. There can be no holding in good faith where the holder knows that he does not have title. *Henshaw v. Ellmeker*, 56 I.D. 241 (1937); *Nora Beatrice Kelley Howerton*, 71 I.D. 429 (1964). To meet the requirements of the statute there must have been an unbroken chain of holding for more than 20 years before the claimant learns of his defect in title. *Prentiss E. Furlow*, 70 I.D. 500 (1963). Hamel learned of his lack of title on August 13, 1959, less than 20 years after December 28, 1940.

Apparently recognizing his inability to qualify under the Color of Title Act, Hamel has stressed on this appeal his assertion that he has acquired by adverse possession the railroad's rights to lot 9, sec. 15, as they existed prior to the filing of the release. He contends therefore that the issuance of a patent to him is a ministerial action which cannot be withheld.

Hamel concedes that his case "is a novel one perhaps." It is indeed. Although the law on some aspects of his case seems to be well-established, it appears to be deficient in respects necessary to solve his problem.

The Supreme Court has held in several cases that title may be acquired by adverse possession to lands granted to railroads in aid of construction of their lines. *Toltec Ranch Company v. Cook*, 191 U.S. 532 (1903); *Iowa Railroad Land Co. v. Blumer*, 206 U.S. 482 (1907); *Missouri Valley Land Co. v. Wiese*, 208 U.S. 234 (1908). The *Toltec* case, in fact, involved the same statutory grant to the Central Pacific Railroad Company that is involved here. The rationale of the cases is that upon the definite location of the line of the roads, "legal title, as distinguished from an equitable or inchoate interest" to the granted lands passed to the railroads. *Deseret Salt Co. v. Tarpey*, 142 U.S. 241, 249 (1891). Issuance of patent was not necessary to transfer the title. A patent would simply be evidence that the grantee had complied with the conditions of the grant and would be a deed of further assurance of his title. *Id.*, 251. The title that passed to the railroad prior to issuance of a patent was sufficient to enable it to bring an action in

ejectment to oust one in adverse possession of the land. Hence, the statute of limitations would run against the railroad by one in adverse possession of the railroad's land. "Adverse possession, therefore, may be said to transfer the title as effectually as a conveyance from the owner; it may be considered as tantamount to a conveyance." *Toltec Ranch Co. v. Cook*, *supra* at 538.

It follows from these ruling that Hamel's predecessors could have acquired title by adverse possession to lot 9, sec. 15, after the map of definite location of the Central Pacific Railroad Company's line was filed, apparently some time in 1864. Assuming that they did, they would have divested the railroad of its legal title to that tract as effectively as if the railroad had conveyed lot 9 to them. If this were so, the railroad had no interest left in the land which it could have reconveyed or relinquished to the United States by the release that it filed on October 28, 1940.

Assuming still that Hamel's predecessors had acquired the railroad's title to lot 9 by adverse possession, what was the effect of that action as against the United States, which still has the record title? The Supreme Court cases cited did not reach this question since in those cases the lands involved had been patented or certified (the equivalent of patenting) to the railroads or their successors and the controversies were between the adverse claimants and the holders of record title to the lands. There is an indication in the *Wiese* case, *supra*, that the Department could not affect the title of the adverse possessors once it was perfected. In that case the tract involved was in the overlapping grants to the Union Pacific Railroad Company and the Sioux City and Pacific Railroad Company. In 1882 Union Pacific sold the tract to John Japp who went into adverse possession of the land until 1891 when he sold the land to Wiese. Wiese continued the adverse possession, completing the ten years of adverse possession required under State law to acquire title to the land. After sundry actions pertaining to the tract, the Department first erroneously issued a patent in 1897 to the Missouri Valley Land Company as the successor to the Sioux City railroad and then, upon a reconveyance, issued a patent in 1903 to Union Pacific and the Missouri Valley Land Company, jointly. Of these actions the court remarked:

That the entry and holding of the land by Japp * * * under the purchase by Japp in 1882 [from Union Pacific], and the continued possession by Wiese after he acquired the land from Japp, should be deemed to have been adverse to the title and possession of the Sioux City Company, if the possession by Japp was not that of a co-tenant, and such possession was unaffected by the proceedings had in the land office subsequent to 1882, is not questioned. * * * *Missouri Valley Land Co. v. Wiese*, 208 U.S. 249 (1908).

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The Supreme Court of Nebraska, whose judgment was affirmed, had said:

* * * Defendants seek to excuse the laches of their grantor [Sioux City railroad] in asserting its claim to the land, by alleging that, up to the time of the final issuance of the patent, the land in controversy was within the exclusive jurisdiction of the Land Department of the United States. If the grant were one which the Department of the Interior had paramount authority to determine, this contention would be well founded; but, as the grant in question was one in praesenti and as the land in controversy was within the place limits and not within the exceptions of the grant, the title of the general government was fully divested by this grant, and any subsequent proceedings in the Interior Department should not and would not toll the statute of limitations. *Wiese v. Union Pacific Ry.*, 108 N.W. 175, 177 (1906).

The only case that we have found which ostensibly dealt with the situation we have here, i.e., the assertion of title by adverse possession to railroad grant lands record title to which is still in the United States, is *Phipps v. Stancliff*, 222 Pac. 328, 336 (Ore. 1924). The land in controversy there was included in a grant to the Oregon and California Railroad Company and title passed to the railroad in 1871 upon the definite location of the road. At that time plaintiff's predecessor was alleged to have been in adverse possession of the land and to have continued in such possession for more than the 10 year period required by the Oregon law on adverse possession. In 1916, because of violations of the granting act, Congress passed the act of June 9, 1916, revesting the United States with title to so much of the granted lands as had not been sold by the railroad prior to July 1, 1913. Defendant was allowed by the land office to enter the tract in controversy as a homestead and he did so on September 19, 1920. In his defense against plaintiff's action to eject him, defendant contended that the United States by the terms of the granting act retained paramount title to the land and that, upon the assertion of title by the 1916 act, plaintiff's title was destroyed.

Upon the authority of the *Toltec*, *Blumer*, and *Wiese* cases, *supra*, the Oregon Supreme Court held that, if plaintiff's allegations of adverse possession were true, his predecessor became vested in 1881 with all the title of the railroad as completely as though the land had been conveyed to him by a deed from the railroad. It followed, the court said

* * * that it was not the purpose nor within the power of Congress, by the enactment of the Chamberlain-Ferris [1916] Act, to divest plaintiff of his complete and perfect title to the land in question * * * and re-vest the same in the United States.

Plaintiff being vested with complete and absolute title to the land, the assertion by the officers of the Land Department of the United States of jurisdiction

over the same is unauthorized and a nullity, and does not constitute any obstacle to the exercise of the power and authority of the state courts to hear and determine this case.

Despite this positive language, the court did not purport to say what should be done about the defendant's homestead entry. Of course, it could not have directed the land office or the Secretary to cancel the entry or to issue a patent to the plaintiff since neither the Secretary nor any of his subordinates was a party in the case. Just what the court thought should be done about clearing the entry of record the court did not say. In fact, however, it appears that although the court's decision was issued on January 14, 1924, the tract in controversy had been patented to the defendant on April 13, 1922 (Patent No. 858785, Roseburg 012316). Moreover, on the subsequent remand of the case in accordance with the court's decision, a judgment was rendered on a verdict for the defendant finding that plaintiff's predecessors had not established title by adverse possession. *Phipps v. Stancliff*, 245 Pac. 508 (Ore. 1926).

We do not have then any case dealing with Hamel's situation, namely an assertion of title by adverse possession to railroad grant lands where record title to the land remains in the United States. This situation seems to present an insoluble problem. Hamel claims to have acquired the railroad's title by adverse possession. This, we have seen, can be done; however, the acquisition of title to private property by adverse possession is a matter of State law to be determined by the State Courts. Since the railroad has by its release relinquished all claim to lot 9, sec. 15, it is not apparent how Hamel could bring an action in the State courts against the railroad now. So far as this Department is concerned, it has no authority to try the issue of adverse possession between Hamel and the railroad. If the release had not been filed, the Department might have been able to patent the land to the railroad so that either Hamel or the railroad could try the title question in the State courts. But the release has been filed so there is no basis upon which the Department could now issue a patent to the railroad. If the Department were to issue a patent to some other applicant under some other law, Hamel might be able to sue him in the State courts on the basis of his asserted prior title by virtue of adverse possession. However, it is unlikely that any other person would wish to buy a lawsuit by taking a patent to the land. It thus appears that there is a dark cloud on the title to lot 9, sec. 15, which precludes effective disposition of the land.

In the circumstances, since a clear judicial remedy seems to be lacking, it would appear that a legislative solution to the problem should

be sought. Such a solution should consider Hamel's possible interests in the land.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4) (a); 24 F.R. 1348), the decision appealed from is affirmed for the reasons stated in this decision but the case is remanded to the Bureau of Land Management for the consideration and proposal of special legislation to resolve the title problem as to lot 9, sec. 15.

EDWARD WEINBERG,
Deputy Solicitor.

**ELGIN A. McKENNA, EXECUTRIX
ESTATE OF P. A. McKENNA**

A-30580

Decided May 12, 1967

Oil and Gas Leases: Acquired Lands Leases

Where jurisdiction over oil and gas deposits in land acquired by the United States for military purposes has been transferred by the Department of the Army to the Secretary of the Interior and the land is later declared surplus pursuant to the provisions of the Federal Property and Administrative Services Act of June 30, 1949, such oil and gas deposits are not subject to leasing under the Mineral Leasing Act for Acquired Lands because that act excludes from leasing oil and gas deposits in lands reported as surplus.

Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Discretion to Lease—Secretary of the Interior

Where the Secretary has agreed to a plan to remove possible objections to the authority of the General Services Administration to sell certain oil and gas deposits and the deposits are disposed in accordance with the plan, it is within his discretionary authority to reject offers to lease the deposits under the Mineral Leasing Act for Acquired Lands, whether or not the sale was legally proper.

Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Discretion to Lease—Secretary of the Interior

The Secretary may in the exercise of his discretionary authority reject non-competitive offers to lease oil and gas deposits in acquired lands if he determines that leasing would be detrimental to the public interest without regard to the propriety of the disposition of the deposits under another statute.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Elgin A. McKenna, Executrix, Estate of P. A. McKenna, as a substitute for P. A. McKenna, deceased, who originally took the appeal,

has appealed to the Secretary of the Interior from a decision dated December 17, 1965, of the Director, Bureau of Land Management, affirming the rejection of 19 noncompetitive offers to lease for oil and gas filed by him pursuant to the Mineral Leasing Act for Acquired Lands of August 7, 1947, 61 Stat. 913, 30 U.S.C. § 351 *et seq.* (1964), for lands in the former Camp Breckinridge Military Reservation area in Kentucky on the ground that the Department of the Interior has no jurisdiction over the oil and gas deposits.

The pertinent facts are not in dispute. The land applied for was acquired by the United States in the 1940's for use as a military reservation. When oil began to be produced from lands adjacent to the reservation and it was feared that the government land would be subject to drainage of its oil and gas, the United States acted to protect its interests. The oil and gas could not be disposed of under the Mineral Leasing Act for Acquired Lands (*supra*) because section 3 specifically excludes land set apart for military purposes from those which the Secretary of the Interior may lease. The land was leasable, however, under the inherent authority of the agency administering the land, to protect the United States against loss by drainage. 40 Ops. Atty. Gen. 41 (1941). The Department of the Army agreeing that this purpose could be best accomplished by the Secretary of the Interior, the latter, pursuant to authority vested in him by Executive Order No. 9337 of April 24, 1943, 8 F.R. 5516, issued Public Land Order 729 dated June 19, 1951, 16 F.R. 6132, transferring jurisdiction over the oil and gas deposits from the Department of the Army to the Department of the Interior.

This Department thereafter issued two leases covering a small portion of the reservation, one in 1957 and the other in 1959.

On December 5, 1962, it appears, the Department of the Army, no longer having use for it, reported all of Camp Breckinridge to the General Services Administration as excess property.¹ General Services Administration then declared it to be surplus on February 7, 1963. On August 27, 1964, General Services Administration requested this Department not to issue any more oil and gas leases under the authority of Public Land Order No. 729. In a letter dated December 10, 1964, to General Services Administration, Administrative Assistant Secretary Beasley agreed, but asserted that the oil and gas deposits were still within the jurisdiction of this Department and could not be declared surplus before the Department found them to be excess.

¹ Federal Property and Administrative Services Act of June 30, 1949, § 202(b), 63 Stat. 384, as amended, 40 U.S.C. § 483(b) (1964).

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General Services Administration did not accept the Department's view and offered the mineral interests in the lands for sale by sealed bids to be opened on April 15, 1965.

General Services Administration then, on December 21, 1964, wrote the Department that it felt Public Land Order No. 729 was no longer effective, that the offering had been advertised, and that the Department's views might adversely affect the bidding or be regarded as clouding the purchaser's title. General Services Administration therefore asked that Public Land Order No. 729 be revoked.

In a memorandum to the Secretary, dated March 11, 1965, the Solicitor reviewed the issue and again concluded that Public Land Order No. 729 had transferred the oil and gas deposits to the Department, that the transfer was not limited in purpose or in time, and that the oil and gas deposits could not be disposed of until the Department had found them excess to its needs.

In the course of attempting to reconcile their divergent views, both the Department and General Services Administration came to believe that if Public Land Order No. 729 were revoked it would terminate the Department's jurisdiction over the minerals regardless of which legal view prevailed on the surplus property question. Since General Services Administration desired to conclude the sales it had undertaken and in order to remove any possible legal barrier to General Services Administration's proceeding as it wished, Public Land Order No. 3706 (30 F.R. 7754) was issued on June 11, 1965, revoking Public Land Order No. 729 and stating that the oil and gas deposits in the lands would be administered by General Services Administration pending their disposal as surplus property.

In the meantime, McKenna filed 16 of his oil and gas lease offers on March 16, 1965, and 3 others later. In a letter dated March 31, 1965, McKenna notified General Services Administration of his offers and in another of April 9, 1965, he proposed that General Services Administration notify prospective bidders of his offers. On April 15, 1965, General Services Administration, through its General Counsel, rejected his suggestion on the ground that it had legal authority to dispose of the oil and gas interests at issue.

On July 9, 1965, General Services Administration announced the acceptance of bids and the names of the successful bidders. On the same day the Eastern States land office rejected McKenna's offers on the ground that the Department no longer had jurisdiction over the oil

and gas deposits in the lands applied for and had, consequently, no authority to lease them. From the Director's decision affirming the land office, McKenna has taken this appeal to the Secretary.

Shortly after the land office decision this Department in a letter dated July 15, 1965, to General Services Administration stated:

With respect to the Camp Breckinridge problem itself, we concluded, as you know, that the Department should remove any basis for raising a legal question as to the validity of those sales in which your agency decides to accept bids or resell. This was accomplished by the issuance on June 11 of an order revoking Public Land Order 729 of June 19, 1951. In this connection, * * * in view of our revocation of Public Land Order 729, we recognize that the responsibility for acceptance or rejection of bids lies with the General Services Administration. * * *

A few days later, on July 21, 1965, the Department, in a letter to Congressman Carl Albert, reviewing the Camp Breckinridge situation, wrote:

Since jurisdiction over oil and gas in the Breckinridge lands has been transferred to the General Services Administration, that agency has been authorized to dispose of those oil and gas deposits. * * *

* * * * *

For these reasons * * * Under Secretary Carver, on June 11, 1965, issued Public Land Order 3706 (30 F.R. 7754), revoking Public Land Order 729. This removed any possible legal barrier to General Services Administration's ability to proceed as it wished.

In his appeal McKenna argues that Public Land Order No. 729 transferred control of the oil and gas deposits from the Department of the Army to the Department of the Interior so that the Army's subsequent declaration of "excess" did not encompass the oil and gas deposits; that not until the oil and gas deposits were declared "excess" by the Secretary of the Interior could General Services Administration declare the oil and gas deposits "surplus"; that once the lands in question were no longer "set apart for military or naval purposes," the oil and gas deposits within them became subject to the Mineral Leasing Act for Acquired Lands, *supra*, and that they remain so notwithstanding the revocation of Public Land Order No. 729; and that to permit General Services Administration to dispose of the oil and gas would be in contravention of the Mineral Leasing Act for Acquired Lands and would exceed the authority delegated by Congress.

Since the appellant has applied for acquired lands oil and gas leases, his offers can be accepted only if the oil and gas deposits are subject to disposition under the Mineral Leasing Act for Acquired Lands. He contends that the deposits came under that act no later than December

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5, 1962, the date the Army's report of excess became final, and in support he quotes from the Solicitor's opinion of March 11, 1965:

* * * once the land is no longer set apart for military or naval purposes and until the oil and gas are found excess by this Department, the oil and gas will be subject to leasing under that Statute [Mineral Leasing Act for Acquired Lands].

The appellant assumes that this statement contains a finding that the lands were no longer set apart for military purposes. On the contrary it makes no such finding. It limited itself to commenting on what would be the result *if* that event occurred.

He recognizes, however, that from the creation of the reservation and up to at least that date, the Secretary had no authority to lease the oil and gas deposits under that act, for, as we have seen, section 3 of the act excludes from the deposits the Secretary may lease, "such deposits in such acquired lands as are * * * set apart for military or naval purposes."

He ignores, however, another provision at the beginning of the same section which provides:

Except where lands have been * * * reported as surplus pursuant to the provisions of the Surplus Property Act of October 3, 1944,² * * * all deposits of * * * oil * * * [and] gas * * * which are owned * * * by the United States and which are within the lands acquired by the United States * * * may be leased by the Secretary * * *.

In other words, oil and gas deposits which are within acquired lands which have been declared surplus are not subject to leasing under that act. As we have seen, the land in which the oil and gas deposits applied for lie was declared surplus on February 7, 1963. From that day on the Secretary had no authority to lease the oil and gas deposits under that act.³ Accordingly for this reason alone the rejection of the appellant's offers was proper.⁴

² The Department has held that the 1944 act "was almost completely repealed and superseded by the Federal Property and Administrative Services Act of 1949 so that the disposal of surplus property is now done under the latter act. Since the 1949 act is substantially a revision and continuation of the 1944 act so far as the disposition of the surplus property of the United States is concerned, the Department has interpreted section 3 of the Mineral Leasing Act for Acquired Lands as excluding lands reported as surplus under the 1949 act. * * *" *Duncan Miller*, A-28949 (September 10, 1962).

³ Furthermore, it is by no means certain that in the period from December 5, 1962, to February 7, 1963, the lands were still not "set aside for military * * * purposes." All that happened on December 5, 1962, was the issuance of a final report declaring the land excess. While such a declaration is a step necessary to the ultimate disposition of the land, it by itself works no change in status of the land. Section 202(b) of the act of June 30, 1949, *supra* fn. 1, provides that it shall be the duty of each executive agency to care for and handle the property it reports as excess. The pertinent regulation provides that the holding

(Footnotes continued on page 138)

There is another reason, however, for affirming the Director. The Mineral Leasing Act for Acquired Lands, as does the Mineral Leasing Act,⁵ leaves to the discretion of the Secretary the determination of what oil and gas deposits are to be leased. Act of August 7, 1947, *supra*, sec. 3, 30 U.S.C. § 352 (1964); *Pease v. Udall*, 332 F. 2d 62 (9th Cir. 1964); *Haley v. Seaton*, 281 F. 2d 620, 623-626 (D.C. Cir. 1960). It is our conclusion, that, even if the Secretary has authority to lease the oil and gas deposits in accordance with appellant's offers, the offers should be rejected in the exercise of the Secretary's discretionary authority.

As we have seen, this Department and General Services Administration engaged in a lengthy exchange of views to determine which one had authority to dispose of the oil and gas deposits in question. Although the two agencies were unable to resolve that issue, it was agreed that the revocation of Public Land Order No. 729 would remove any basis for raising a legal question as to the validity of the sales which General Services Administration desired to complete. Only after the order was revoked did General Services Administration consummate the sales by accepting the bids. Having been fully informed of the disposition proposed by General Services Administration and having agreed that the Department could take an action to remove the legal issue, and having taken that step, this Department should not now issue leases which would purport to dispose of the same deposits to other persons under another statute.

Furthermore, aside from the dispute over who had the legal authority to dispose of these oil and gas deposits, there was the question of which method would best serve the public interest.

In a letter dated March 2, 1966, to Senator Henry M. Jackson, the Department wrote:

As a matter of policy, we have generally favored leasing rather than sale of mineral resources underlying Federal lands, partly in the interest of consistency with the policy established in the Mineral Leasing Act of 1920 and partly be-

agency, that is, the agency which has accountability for the property involved (41 CFR § 101-47.103-7) "shall retain custody and accountability for excess and surplus real property * * * pending its transfer to a Federal agency for disposal."

Thus, while we need not decide the point, it may well be that the lands were still under the jurisdiction of the Department of the Army and set apart for military purposes after they were reported excess and even after they were declared surplus.

⁴ This conclusion is not inconsistent with the Department's view that until Public Land Order No. 729 was revoked and the lands reported as excess General Services Administration had no authority to dispose of the oil and gas deposits. The oil and gas deposits remained under the jurisdiction of the Secretary of the Interior, but he could lease them under his inherent authority only to prevent loss to the United States by drainage or threat of drainage. *Arnold R. Gilbert, Belco Petroleum Corporation*, A-29123 (January 14, 1963).

⁵ Act of February 25, 1920, sec. 17, as amended, 77 Stat. 782 (1960), 30 U.S.C. § 226 (1964).

cause of the difficulty in determining the extent and therefore the fair market value of such deposits. Our experience in this area has, of course, related primarily to public domain lands where, for the most part, title to the surface remains in the United States during and after the period of mineral extraction. We recognize that the situation might be different in the case of acquired lands in process of disposal under surplus property procedures.

* * * * *

The bids which General Services Administration received from the oil and gas rights were considerably higher than had been anticipated. Future revenues, if Interior were to lease the deposits, were speculative. The bulk of the lands offered by the General Services Administration had not been classified as being on the known geologic structure of a producing oil or gas field, nor could they be under the existing conditions. Thus, Interior would not have been able to lease the oil and gas competitively. Accordingly, no bonus payments would have accrued to the Government if the decisions had been made to lease the oil and gas.

In the face of divergent legal opinions, the absence of competition and bonus payments for leasing, the impressive success of the sale procedure to date, and other factors, the matter received further consideration in the Department. The result, with Secretary Udall's ultimate approval, was a decision to facilitate the General Services Administration sale by removing the principal technical barrier. Accordingly, through the issuance of Public Land Order 3706, Public Land Order 729 was revoked and the lands transferred to the administrative jurisdiction of GSA. This action had the concurrence of our Solicitor as to its legal sufficiency in permitting General Services Administration to proceed. By letter of July 15, 1965, however, Administrator Knott was advised of our continuing concern over the legal uncertainties involved and the need for further joint study of the policy issues which would most certainly arise in future cases.

* * * * *

Entirely apart from legal or general policy considerations, this transaction seems to us to have been fully justified and in the public interest from the standpoint of prudent business judgment.

* * * * *

Consideration was given to renewing our objection to General Services Administration's sale proposal and to proposing instead that legislative authorization be sought for competitive leasing. However, taking into account both the uncertainties always attendant upon legislation and the absence of information upon which to estimate leasing revenue, it was concluded that the Department would not be warranted in continuing to oppose General Services Administration's acceptance of the bids it had received.

Thus it is clear that this Department had decided that it was in the public interest to allow General Services Administration to handle the disposition of the oil and gas. It is clear that the Department had concluded also that it would not be in the public interest in any

event for the Department to have made the oil and gas deposits available for noncompetitive leasing.

Consequently, it having been concluded for both legal and policy reasons that the Department ought not to attempt to lease the oil and gas deposits, it is well within the Secretary's discretion to refuse to issue leases now.

A somewhat similar problem was at issue in *Pease v. Udall*, *supra*. There the Secretary had refused to issue noncompetitive oil and gas leases to plaintiff under the Mineral Leasing Act, *supra*, for lands in the Tyonek Reserve, an area withdrawn and reserved for the benefit of Alaskan natives, but had decided instead to lease them competitively pursuant to other authority. The District Court upheld the rejection of plaintiff's offers on the ground that the land was not subject to leasing under the Mineral Leasing Act but only in accordance with the act of March 3, 1927, 44 Stat. 1347, 25 U.S.C. § 398 (1964), an act providing for leasing of oil and gas deposits in reservations or withdrawals created by Executive Order for Indian purposes. The Court of Appeals held:

Appellant contends, for reasons we need not discuss, that the Act of March 3, 1927, has no application to the Tyonek Reserve. Therefore, she contends, those lands are unreserved public lands as to which the Mineral Leasing Act applies. Since she is the first qualified applicant, she contends, she is entitled as a matter of right to a lease without having to submit to competitive bidding.

The initial difficulty with appellant's position—and which we find dispositive—is that the Mineral Leasing Act has consistently been construed as leaving to the Secretary, within his discretion, a determination as to what lands are to be leased thereunder. *Haley v. Seaton* (D.C. Cir., 1960) 281 F. 2d 620, 623-626. Here the determination of the Secretary through the acting director of the Bureau of Land Management was that "leasing of these reserved lands for oil and gas exploration under the Mineral Leasing Act would be inconsistent with the public interest associated with the administration of the Tyonek Reserve."

Appellant protests that the Department has, by its decision to solicit competitive bids for the sale of leases, determined that these lands were to be leased. Having made such a determination, appellant contends, the only question remaining is as to the Act which properly controls the manner of leasing. If, appellant contends, the Mineral Leasing Act is the law which properly controls, refusal of the Secretary to proceed under that Act is arbitrary.

We disagree. We reject at the outset appellant's complaint that she was not informed in greater detail as to the grounds on which her petition was rejected. This is not a case in which some other applicant was preferred. The policy of the Department, in our view, was made clear that it did not choose to lease to anyone under the Mineral Leasing Act.

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In our judgment the Secretary has discretion not to lease at all under that Act (even though it be the only Act applicable to leases in this area) if it was felt that such leasing would be detrimental to the public interest. Such a determination is not at all inconsistent with a determination that if such be legally permissible, the interests of natives and the public will be served by a sale of leases conducted under the regulations relating to the leasing of Indian lands. Such regulations include provisions not only for competitive bidding, but for the right of the Secretary to reject all bids when he believes the interests of Indians will be best served by doing so. The difference in the nature and degree of the public advantage which would result from leasing under one or the other authority is substantial and constitutes a valid consideration in the exercise of discretion.

Irrespective of the propriety or impropriety of the competitive sale of leases under the Act of March 3, 1927 (a question we do not here reach), appellant then had no right to compel a lease to her under the Mineral Leasing Act. The rejection of her application, for the reasons we have stated, cannot be held an arbitrary or otherwise improper exercise of discretion.

Thus the Department may properly in its discretion refuse to issue leases to appellant because it believes leasing under the Mineral Leasing Act for Acquired Lands is not in the public interest, irrespective of the propriety of the sale of the oil and gas deposits by General Services Administration.

We conclude, then, that as a matter of law and as a proper exercise of discretion the appellant's offers were properly rejected.

Therefore, the decision of the Director of the Bureau of Land Management is affirmed for the reasons herein stated.

STEWART L. UDALL,
Secretary of the Interior.

DAVID W. HARPER ET AL.

A-30719

Decided May 15, 1967

Mining Claims: Withdrawn Land—Withdrawals and Reservations: Effect of

Mining claims located on land withdrawn from such entry are null and void *ab initio* and will not be validated by the modification or revocation of the order of withdrawal to open the land thereafter to mineral entry.

Mining Claims: Determination of Validity—Mining Claims: Hearings

No hearing is required to declare mining claims void *ab initio* where the records of the Department show that at the time of location of the claims the land was not open to such location.

Mining Claims: Location

The location of a valid mining claim vests in the locator a present right of possession, and where, because land has been withdrawn from such entry, a locator can obtain no present interest in the land a mining location on such land can be only a nullity.

Accretion—Public Lands: Jurisdiction Over—Withdrawals and Reservations: Generally

Where, subsequent to survey, lands have formed by accretion in front of lots which are part of an area withdrawn from entry under the public land laws and placed under the administrative jurisdiction of an agency of the Federal Government, the administering agency acquires jurisdiction over the accreted lands, and the lands become subject to the same restricted usage as the lands to which they are accreted.

Withdrawals and Reservations: Effect of

Lands which have been withdrawn from entry under some or all of the public land laws remain so withdrawn until the revocation or modification of the order of withdrawal, and it is immaterial whether the lands are presently being, or have ever been, used for the purpose for which they were withdrawn.

Withdrawals and Reservations: Revocation and Restoration

Where an order revoking a withdrawal and restoring land to entry specifies that it is to be effective on a future date the status of the land remains unchanged until that date, and the land remains, during the interval between issuance of the order and the effective date provided therein, closed to the types of entry from which it has been withdrawn.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

David W. Harper and other members of the Peacock Spit Association have appealed to the Secretary of the Interior from a decision dated August 9, 1966, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Oregon land

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office declaring the Peacock Spit Nos. 1, 2, 3, 4, 6, 7, and 8 placer mining claims in sec. 5, T. 9 N., R. 11 W., W. Mer., Washington, null and void *ab initio* for the reason that the lands embraced by the claims were not open to location under the mining laws at the time of the purported locations.

The Peacock Spit Nos. 1 and 4 claims were located on March 13, and March 6, 1964, respectively, and the remaining claims listed were located on March 10, 1964. The claims were located by David W. Harper and Robert Trumbull on lots 2, 3, 4 and 5, sec. 5, T. 9 N., R. 11 W., or lands accreted thereto. By a decision dated March 31, 1965, the land office declared the claims null and void upon findings that lots 2, 3, 4 and 5 were, at the time of the purported locations, included in a reservation for military and/or lighthouse purposes by Executive Orders of February 26, 1852, and December 27, 1859, and were not subject to the operation of the public land laws¹ and that the jurisdiction over all lands formed by accretion in front of the withdrawn lands vested in the administering agency, thereby barring mineral location on the accreted lands, citing *Myrtle White*, 56 I.D. 300 (1938).²

In appealing to the Director, Bureau of Land Management, appellants contended, in substance, that notice of the land office decision was not served upon all of the owners of record, that the decision was, therefore, not binding upon such owners and that the Bureau has waived its right to declare their interest null and void or is estopped

¹ The Executive Order of February 26, 1852, reserved the lands described "from sale or grant," terms sufficiently broad to include disposition under the mining laws. Those laws provide that all valuable mineral deposits in lands belonging to the United States shall be open to "exploration and purchase," 30 U.S.C. § 22 (1964).

² Subsequent to the issuance of the land office decision of March 31, 1965, which was addressed to Harper and Trumbull, it was learned that Harper and Trumbull had located the claims under a power of attorney executed by the members of the Peacock Spit Association which authorized Trumbull, as attorney in fact for the association, to post, file and record mining claims in his own name, or in his name and that of Harper, or in the name of the association, and that by a quitclaim deed dated April 1, 1964, and filed for record on May 18, 1964, Harper and Trumbull conveyed their interest in the mining claims to Jim Wasch, Walter L. West, Leonard E. Cason, David W. Harper, Andrew A. Ilg, Franklin W. Blank, Jr., Charles J. Couturier, John Porter, Ralph Johnson, A. J. Dickes, Bernard West, A. Victor Rosenfeld, William Rozelle, and Robert W. Trumbull, "as joint venturers in a group known as the PEACOCK SPIT ASSOCIATION." By a decision dated May 18, 1965, each of the named members of the association was notified of the determination made on March 31, 1965. An appeal to the Director, Bureau of Land Management, was filed in the names of Harper and Trumbull only during the interval between issuance of the two land office decisions, and no appeal to the Director was filed by any other member of the association. The present appeal, however, was filed in the names of all of the individuals comprising the association.

from doing so, that the lands upon which the claims were located were open to such location after October 7, 1963, or that, in any event, the claims were validated after April 7, 1964, by virtue of Public Land Order No. 3244,³ that either the claims located on lands in lots 2, 3, 4 and 5, as surveyed, are valid, or that the claims located on accreted lands are valid, but that, since the land office made no distinction between the two, all of the claims are valid, and that the Bureau does not have jurisdiction or authority to declare the claims void. Appellants subsequently requested a hearing on the issues.

The Office of Appeals and Hearings held that, while the original decision of March 31, 1965, did not name all of the record owners of the claims, and jurisdiction was not thereby obtained over all of the owners, the amended decision of May 18, 1965, did name all of the record owners, each of whom was properly served, and that the Bureau had not waived or relinquished any jurisdiction to determine the validity of the claims. It further found that the lands were not available for mining location from and after October 7, 1963. (the date of Public Land Order No. 3244), that there was no difference in the status of the lands in the lots as originally surveyed and the accretions thereto, that Public Land Order No. 3244 did not validate the claims from and after April 7, 1964, but that, in order to validate invalid locations, it would have been necessary to relocate the claims after the lands upon which they were situated were opened to such location, and that the Bureau does have authority to determine the validity of unpatented mining claims located on land, title to which is in the United States. The Office of Appeals and Hearings denied appellants' request for a hearing for the reason that a hearing is not necessary to

³ Public Land Order No. 3244 of October 7, 1963 (28 F.R. 10973), revoked the Executive Orders of February 26, 1852, and December 27, 1859, insofar as they affected certain lands in secs. 4 and 5, T. 9 N., R. 11 W., including the lands in question, and provided in pertinent part that:

"3. Until 10:00 a.m. on April 7, 1964, the State of Washington shall have a preferred right of application to select the lands in accordance with the provisions of subsection (c) of section 2 of the Act of August 27, 1958 (72 Stat. 928; 43 U.S.C. secs. 851, 852).

"4. This order shall not otherwise be effective to change the status of the lands until 10:00 a.m. on April 7, 1964. At that time the said lands shall be open to operation of the public land laws generally, subject to valid existing rights, the requirements of applicable law, and the provisions of any existing withdrawals. All valid applications except preference right applications from the State of Washington received prior to 10:00 a.m. on April 7, 1964 will be considered as simultaneously filed at that time.

"5. The lands have been open to applications and offers under the mineral leasing laws. They will be open to location under the United States mining laws at 10:00 a.m. on April 7, 1964."

declare a mining claim void *ab initio* where the records of the Department show that at the time of location of the claim the land upon which the claim was located was not open to such location, citing *The Dredge Corporation*, 64 I.D. 368 (1957), 65 I.D. 336 (1958); *aff'd* in *Dredge Corporation v. Penny*, 362 F. 2d 889 (9th Cir. 1966).

The principles of law governing the attempted location of a mining claim on land closed to mineral entry are quite simply stated and have been frequently repeated. A mining claim located on land which is not open to such location confers no rights on the locator and is properly declared null and void *ab initio*, and where the records of this Department show that land was not open to mining location at the time such a location was attempted, a hearing is not required to establish the invalidity of the claim. *The Dredge Corporation, supra*; *Ernest Smith*, A-29590 (August 2, 1963); *Metalline Contact Mines et al.*, A-29707 (December 11, 1963); *Robert K. Foster et al.*, A-29857 (June 15, 1964), and cases cited, *aff'd* in *Foster v. Jensen*, Civil No. 64-1110-WM, in the United States District Court for the Southern District of California (September 13, 1966). Moreover, the subsequent revocation or modification of the order withdrawing land from mineral entry, and the restoration of the land to entry under the mining laws, will not validate a claim located while the land was closed to location, although the locator may be at liberty to locate a new claim. *Howard W. Balsley*, A-27920 (June 15, 1959); *Flora B. Peterson*, A-28193 (March 28, 1960); *California Alluvial Mining Corporation*, A-29806 (November 13, 1963); *Betty J. Fuller*, *Luella M. Strother*, A-30218 (July 13, 1964). Where an order revoking or modifying a withdrawal and restoring land to entry specifies that it is to be effective on a future date, the status of the land remains unchanged until that date, and the land remains, during the interval between issuance of the order and the effective date provided therein, closed to the types of entries from which it has been withdrawn. *Mary E. Brown*, 62 I.D. 107 (1955). Finally, where, subsequent to survey, lands have formed by accretion in front of lots which are part of an area withdrawn from entry under the public land laws and placed under the administrative jurisdiction of an agency of the Federal Government, the administering agency acquires jurisdiction over the accreted lands, and the lands become subject to the same restricted usage as the lands to which they are accreted. *Myrtle White, supra*.

When the foregoing principles are applied in the present case to mining claims on lands and accretions thereto withdrawn from operation of the public land laws for military purposes, which claims were located subsequent to the issuance of an order opening the lands to entry under the mining laws, but prior to the effective date of the order, the Bureau's conclusions with respect to the validity of those claims and the rights of the claimants seem obvious and inescapable. Nevertheless, appellants argue with vigor and at length, and with some novel interpretations of law, that their claims are excepted from the effects of the rules just set forth.

In their present appeal appellants contend, in substance, that :

(1) There has been substantial compliance with all of the applicable statutes and orders, and, under the facts shown to exist here, the laws and orders should be liberally construed to validate all of the claims in question ;

(2) (a) Lands in military reservations were opened to operation of the mining laws by section 6 of the act of February 28, 1958, 43 U.S.C. § 158 (1964), or, in the alternative,

(b) the validity of the claims should be upheld where the lands ceased to be used, or were never used, for the purpose for which they were reserved or for any remotely related purpose ;

(3) The locations should be considered as suspended pending restoration by Public Land Order No. 3244 of land subject to that order ; or

(4) The locations should be regarded as valid simultaneously filed applications to be acted upon when the lands become available for mineral location ;

(5) The Bureau breached its discretion in failing to allow a hearing to discover essential facts which were not known or resolved at the time the previous decisions were issued ; and

(6) The appeals of Trumbull and Harper amounted to appeals by all of the individuals constituting the association.

Appellants' initial point, that the mining laws should be liberally construed to recognize their "substantial compliance" with the requirements for valid locations, is patently unsound. If the lands in question were not open to mining location at the time of appellants' purported locations, there was no possible way that the appellants could comply with the requirements for locating a claim on those lands, to say nothing of "substantially complying." The cases cited in support of this proposition are quite irrelevant to the facts of the present case.

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Appellants' second contention appears to have an air of plausibility. However, it is not able to bear any degree of scrutiny. Appellants acknowledge that lands which are reserved for a special public or governmental use are no longer subject to disposal under the public land laws and that mining claims attempted on lands which are withdrawn from mineral entry are properly declared void *ab initio*. But in this instance, they contend, Congress has provided an exception to the general rule in section 6 of the act of February 28, 1958 (72 Stat. 30); *supra*, which provides that:

All withdrawals or reservations of public lands for the use of any agency of the Department of Defense, except lands withdrawn or reserved specifically as naval petroleum, naval oil shale, or naval coal reserves, heretofore or hereafter made by the United States, shall be deemed to be subject to the condition that all minerals, including oil and gas, in the lands so withdrawn or reserved are under the jurisdiction of the Secretary of the Interior and there shall be no disposition of, or exploration for, any minerals in such lands except under the applicable public land mining and mineral leasing laws: *Provided*, That no disposition of, or exploration for, any minerals in such lands shall be made where the Secretary of Defense, after consultation with the Secretary of the Interior, determines that such disposition or exploration is inconsistent with the military use of the lands so withdrawn or reserved.

Appellants contend that the effect of this statute was to open to mineral exploration and disposition all lands withdrawn for military purposes except in such instances as the Secretary of Defense, after consultation with the Secretary of the Interior, determined that such disposition would be inconsistent with the military use of the withdrawn lands. Since there is no evidence here of such joint determination, it is argued, the lands in question were opened to mining entry.

Appellants' interpretation of the statute is not supported by the statutory language itself, and the magnitude of their error is readily disclosed by the legislative history of the act. In explaining the purpose of this particular provision, the Senate Committee on Interior and Insular Affairs stated that:

Finally, the reported measure provides, in section 6, that all minerals in withdrawn or reserved public lands—except lands withdrawn or reserved specifically as naval petroleum, naval oil shale, or naval coal reserves—are under the jurisdiction of the Secretary of the Interior, and that no disposition thereof shall be made except under—

* * * the applicable public land mining and mineral leasing laws.

Read together with the committee findings above respecting the Defense post-

tion on petroleum resources, the object and purpose of this section are clear. Until the presentation by Defense witnesses on petroleum reserves, and the effect of the prospective airspace withdrawal on pending applications for restriction of outer Continental Shelf lands, committee members had believed there was universal agreement that responsibility for disposition of minerals in withdrawn or reserved public lands was exclusively vested in the Secretary of the Interior.

Enactment of this section into law actually constitutes a restatement of the law as it is today, in the view of the committee and the Department of the Interior. In short, as declared above, the provisions of section 6 of the reported bill will serve to remove whatever doubts may exist, if any, as to the laws which govern the disposal of or exploration for, any and all minerals, including oil and gas, in public lands of the United States heretofore or hereafter withdrawn or reserved by the United States for the use of defense agencies. 2 U.S. Code Cong. & Ad. News 2244 (1958). (Italics added).

Little more need be said in explanation of the provision.

The same argument that appellants make was rejected by the Department shortly after the 1958 act was enacted. The argument then was addressed to the availability of withdrawn land for oil and gas leasing as a result of the 1958 act, the withdrawn land theretofore having been withdrawn from mineral leasing. The Department held that the statute did not open to mineral leasing land which previously had been withdrawn from leasing. *B. L. Haviside, Jr.*, 66 I.D. 272 (1959).

Appellants acknowledge that the "legislative reports do not detail what procedure is necessary for such lands to become subject to the public land laws and under what circumstances." In this appellants are entirely correct. In view of the explanation given, however, it is clear that the procedure is the same as that which preceded the 1958 act. That is, an order withdrawing land from mineral entry may be revoked by an order of equal efficacy restoring the land to such entry. It is neither contended here that such an order was issued prior to Public Land Order No. 3244, *supra*, which did not open the land to mineral location until April 7, 1964, nor has it been suggested that the withdrawal orders did not, at the outset, remove the lands from operation of the mining laws of the United States. *Cf. Frank M. Whitenack*, A-28206 (March 29, 1960).

In the alternative, appellants contend that, even without the benefit of a formal order of revocation or restoration, the lands in question became subject to mining entry when they were no longer used or needed for the purpose for which they were withdrawn. The decisions relied upon as authority for this proposition not only fail to support appellants' position, but they remove therefrom such support as appellants may have supposed their reasoning to provide. In *Robert K.*

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Foster et al., supra, one of the cases cited by appellants, the Department held that a mining claim located on land within a first-form reclamation withdrawal was null and void where the land had not been opened to mining entry at the time of location, even though the Commissioner of Reclamation had previously authorized the revocation of the withdrawal. In that case it appeared that at the time of location of the mining claim the land was neither needed for the purpose for which it had been withdrawn nor had it ever been used for that purpose. Thus, it is clear that it is the legal effect of a withdrawal that is determinative of the question of the availability of land for mining entry and that the actual use to which the land has been put or to which it presently is put is immaterial. See *California Alluvial Mining Corporation, supra*. The record before us leaves no doubt but that the lands in question remained in a withdrawn status, closed to mineral entry, at the time of appellants' locations.

In contending that their locations should be considered as suspended pending restoration of the lands to entry or that they should be regarded as valid simultaneously filed applications, to be acted upon when the lands become available for mineral location, appellants again reveal a basic misunderstanding of the applicable law. The Department has by express provisions in restoration orders permitted applications to be filed for land prior to the date on which the land is opened to disposal. (See e.g., *Rachael S. Preston*, 63 I.D. 40 (1956); *Kenneth R. Johnston*, A-28886 (August 1, 1962).)⁴ However, these instances have not involved the location of mining claims.

The appellants cite the case of *State of Alaska, Andrew J. Kalerak, Jr.*, 73 I.D. 1 (1966), in which the Department held that a premature State selection application, filed for withdrawn land, could nonetheless be accepted under the unique circumstances of the case following the revocation of the withdrawal. There again, however, a mining location was not involved. In the *Alaska, Kalerak* decision, the Department explained that the reasons for its refusal generally to accept applications for lands before they are open to disposition were primarily matters of policy. Nevertheless, it pointed out, the policy need not preclude absolutely the acceptance of applications for land prior to the time that the land becomes available for disposition, where no rights are vested in an applicant by the filing of his application other

⁴ Public Land Order No. 3244 itself, in fact, contained provision for such filing of applications under the public land laws generally.

than the right to have the application considered, if no undue administrative burden is placed upon the Department in accepting such premature applications and if the applications can be adjudicated in such a manner that no applicant can obtain an advantage over another applicant by virtue of his premature filing. These conditions cannot arise with respect to the location of a mining claim.⁵

The ordinary application to enter land under the various public land laws, or to lease land under the mineral leasing laws of the United States, imposes upon this Department the responsibility for determining whether the land can or should be disposed of pursuant to the particular law under which application is filed, whether the applicant is qualified under that law to have his application approved, and, if the land is suitable and the applicant is qualified, whether one applicant is to be preferred over another equally qualified applicant in the event of competing applications. It is only after the Department has made these determinations that any rights in the land vest in an applicant. This is not true of the location of a mining claim. The locator of a mining claim does not file an application to locate a claim, and the acts required for the location of a claim do not include even notice to this Department. The location of a valid mining claim is, in effect, a grant from the United States, and, by the location of a valid claim, the locator is vested with a present right of possession without action on the part of this Department. See *Wilbur v. Krushnic*, 280 U.S. 306, 316 (1930); *United States v. Wilmot D. Everett et al.*, A-27010 (Supp.) (October 17, 1955).⁶ The validity of a claim, of course, is dependent upon the existence of a number of facts, one of the requisite conditions being, as we have already noted, that the land must have been open to mining entry at the time of the location, and the United States may, at any time prior to the issuance of patent, challenge the validity of any mining claim in an appropriate proceeding. *Cameron v. United States*, 252 U.S. 450, 460 (1920). But where land is open to mining location this Department has no part in the activities which precede the loca-

⁵ It may be noted that in a suit filed to review the Department's decision in the *Kalerak* case, the United States District Court for the District of Alaska disagreed with the Department and held that the State selection was not valid because it was filed while the lands selected were withdrawn. *Kalerak v. Udall*, Civil No. A-85-66 (October 20, 1966).

⁶ Prior to July 23, 1955, the location of a valid mining claim vested in the locator an exclusive, as well as immediate, right of possession. Section 4 of the act of that date, 30 U.S.C. § 612 (1964), subjected claims located thereafter to the right of the United States to manage and dispose of the vegetative and other surface resources until the issuance of patent.

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tion of a claim, the exclusion extending to approval or disapproval of the location. Thus, appellants' attempt to find an analogy in the premature location of a mining claim and the premature filing of an application to enter, or to obtain an interest in, land is without merit.⁷

In support of their contention that they are entitled to a hearing on the validity of their claims appellants have listed 7 issues which they assert "were either not of record at the time of the Bureau's prior decisions or should have been resolved prior to the rendering of any decision in this matter." As we have already indicated, a single issue is raised by this appeal—were the lands in question open to mineral location at the time of appellants' purported locations?—and that issue can be resolved only by resort to matters of official record in the Department and requires no hearing for the examination of witnesses. Unless that issue is resolved in appellants' favor, all other matters are immaterial. For reasons already given that issue has been resolved against the contentions of the appellants, and the issues on which they seek a hearing remain immaterial or have been disposed of as incidents to the questions which have been treated. Accordingly, their request for a hearing was properly denied.

In view of the conclusions reached it is unnecessary to consider the merits of appellants' contention that the appeal of Robert W. Trumbull and David W. Harper to the Director, Bureau of Land Management, was an appeal on behalf of all of the individuals named as parties in interest and protected the rights of any who failed to appeal from the decision of the land office.⁸

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

⁷ It does not, in fact, appear that the lands in question have, to date, become subject to mining location, the record indicating that they were classified on March 6 and 27, 1964, for disposition only under the Recreation and Public Purposes Act of June 14, 1926, as amended, 43 U.S.C. § 869 (1964), which classification precludes appropriation under any other public land law. Since it is not alleged that the claims were relocated after April 7, 1964, it is unnecessary to answer the contention, implied but not argued by appellants, that the classification for recreation and public purposes was ineffective to prevent the lands from being opened to mining location on April 7, 1964, in accordance with the terms of Public Land Order No. 3244.

⁸ In their notice of appeal to the Secretary, appellants asserted, *inter alia*, that the decision of the land office was not binding upon the entity known as the "Peacock Spit Association." In their subsequent brief they did not elaborate upon this contention and, apparently, have abandoned it as a point for serious debate. This, and other contentions similarly treated by appellants, have been examined and are dismissed without discussion of their merits.

APPEAL OF S. S. MULLEN, INC.

IBCA-517-9-65

*Decided May 15, 1967***Contracts: Construction and Operation: Changes and Extras—Contracts:
Disputes and Remedies: Equitable Adjustments**

Under a tunnel construction contract that authorized the use of channel lagging between steel arches (to perform the necessary function of supporting the sides and roof of the tunnel), where a change was ordered in the contractor's proposed conventional method of attaching the channel steel lagging, which change required the cutting of notches in the channels and reversing the lagging so that the pieces of lagging were fitted (in part) between the steel arches, resulting in a technical restriction of excavation and concrete "pay" lines, the equitable adjustment contemplated by the standard form of Changes Clause should not be limited to the expense of cutting the notches but also should provide reasonable settlement for costs that the contractor had included in its bid on the assumption that the conventional lagging method and associated wider pay lines would be acceptable on the project.

BOARD OF CONTRACT APPEALS

The Government and the appellant have disagreed over the amount that should be paid to the latter as the equitable adjustment due because the Government directed a change in one of the appellant's construction processes. The dispute to be considered in this appeal arose in the early stages of the work on the Joes Valley Dam, which in the spring of 1963 the appellant undertook to perform for an estimated contract price of \$3,562,260.

In late July 1963, shortly after the appellant (Mullen) had commenced the excavation work for the dam's spillway and diversion tunnel, the Government ordered Mullen to reverse the application of channel lagging that was being placed on permanent artificial supports in the tunnel. As a result of the order, the "U" of the lagging was turned inward, rather than outward as Mullen had proposed; in addition, Mullen was told to cut notches one-inch deep by four-inches long into the flanges (legs) of the channel lagging so that part of each piece of lagging could be fitted between the tunnel supports. If the changes had not been made by the contracting officer, the appellant, following the recommendation of its supplier, would have placed the channel lagging with its legs out (toward the unexcavated side and overhead areas) and with the center portion of its "U" shape lying against, and secured to, the outer edges of the tunnel supports. The

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metal tunnel supports themselves resemble the arches or ribs of a covered wagon. One end of a piece of channel lagging was fastened to one rib, and the other end was fastened to an adjoining rib, so that the lagging, spanning between the ribs, helped to maintain the unexcavated rock in its original position. Approximately 3,560 individual pieces of channel lagging were used on the project.¹

The Government paid \$2,500 to Mullen for making the notches in the pieces of channel lagging.² The appellant has accepted that sum as proper payment for the notching work, but contends that the Government's liability associated with the change³ goes considerably beyond that point. The Government's position is that it has no obligation to pay the remaining costs sought by Mullen because the Government only took action to approve or disapprove details of fabrication and installation in accordance with authorization in the contract. Mullen would, we believe, characterize the turning and setting in of the lagging as more of an ingenious maneuver than a proper exercise of approval authority.

The Government concedes that the notching was ordered to "bring the B line one inch closer to the structural steel [ribs]."⁴ The change decreased, rather than increased the structural strength of the lagging.⁵ The purpose of the "B" line, a pay line outside of an "A" line is explained in the Government counsel's Post-Hearing Brief as follows:

The "B" line or payline is a line a certain distance outside of the "A" line, to which the Government agrees to pay for excavation and [placed quantities of] concrete regardless of whether the limits of the actual excavation fall inside or outside of its dimensions. It is the contractor's sole responsibility to decide what method of excavation will be the most economical for his operations. A contractor may set his rock drills and blasting patterns to excavate to a very tight line and then go through the tunnel afterwards removing any protrusions within the "A" line. On the other hand, he may decide to drill and blast to wider dimensions, causing more overbreak than the above-described method, but insuring that no rock will protrude within the "A" line, thus doing all the excavation in one step. * * *

¹ Tr. 60.

² Change Order No. 5.

³ The change was made under Clause 3, "Changes" of Standard Form 23A (April 1961 edition).

⁴ Tr. 84.

⁵ Tr. 85.

⁶ Government's Post-Hearing Brief, page 8.

Drawing 304-D-6, which was included in the invitation for bids and made a part of the contract, showed alternate installation methods for "Typical Tunnel Supports," including one utilizing structural steel ribs and metal lagging (the type of support materials ordered and brought to the project site by Mullen). The "B" line is shown to be three inches outside of the steel ribs and attached metal lagging. However, dimensions for the ribs and lagging are not shown.

Mullen obtained a quotation on the permanent tunnel supports from an approved source, a company with (according to a Government engineer) "a good record and a good name."⁷ The supplier also furnished a drawing⁸ showing the suggested method of clamping the channel lagging to the ribs. The depth (approximately two inches) of the channel lagging is shown on the supplier's drawing to be entirely *outside* the ribs. As a result of the Government's order to notch and fit the pieces of lagging, about one inch of the two-inch lagging dimension was fitted between the ribs rather than outside of them. This reduced from five inches to four inches the "B" line pay quantity that Mullen had counted upon in preparing its bid.⁹

The appellant's vice president explained his method of computing the unit prices for the excavation and concrete quantities involved in this case as follows:

You take the payline that you are going to get paid for and figure the volume of excavation that you would do up to that point. Then usually you would allow a percentage on top of that for overbreak, which is normal in tunnel work, and you divide that by your total cost and you get a unit price for the work you intend to do.¹⁰

The Government counsel, in his statement of position, contends (p. 5):

*** the contracting officer, under the provisions of Paragraph 54, has the right to approve the details of fabrication and installation of approved structural steel ribs and lagging. By letter of July 26, 1963, the contractor's proposal for the use of channel lagging was approved with the understanding that the "B" line would be established as 4 inches outside the outer surface of the structural-steel ribs. This approval contemplated the oral direction given the same day to notch the ends of the lagging members ***.

The Government asserts also that since the "approval and direction"

⁷ Tr. 96. The appellant's supplier furnishes at least 75 percent of all structural steel that goes into tunnel construction in the West; Tr. 17.

⁸ Appellant's Exhibit C, which bears the date "12-28-48," and is entitled "Standard Structural Channel Lagging."

⁹ Tr. 15 and 28.

¹⁰ Tr. 11.

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was given prior to the tunnel excavation the appellant "cannot complain that he drove the tunnel"¹¹ expecting to receive payment for the additional inch of excavation and concrete.

The appellant's statements concerning its expectations are related to the time of bid preparation, not to the period when the tunnel was driven. Mullen's contention is that, realistically, the only effect of the Government's change, taking into account the fact that it was made after Mullen's men, equipment and channel lagging were on the job, was to "keep us from getting paid at all up to that point."¹² The appellant's construction manager testified directly that "you'd have to shoot about the same anyway, we didn't provide on shooting any closer than that [five inches measured from the outside of the tunnel supports]."¹³

If Mullen's drilling and shooting crew had been able to excavate to a line approximately four inches outside of the permanent steel supports, such action would have been greatly to Mullen's advantage. For one thing, the principal disputed cost item in this appeal would have been eliminated. Also, it would not have been necessary to place as much concrete in excavated areas that were not covered by a payment provision. However, it is apparent that the revision in drilling and shooting plans, and the very careful work that would have been necessary to excavate to the "4 inch" line were not achievable by Mullen's construction forces. Using a method that the Government concedes was not "careless or negligent as contemplated by Paragraph 107e of the specifications,"¹⁴ the appellant's excavation activities resulted in overbreak of approximately 60 percent—"overbreak" meaning material excavated beyond the B line.¹⁵ In some tunnels, overbreak has been kept within five percent, but normally, according to a Government engineer, tunnel overbreakage could be expected to be between 15 and 20 percent.¹⁶ Thus, excavation ordinarily extends beyond both the A and B lines.

The Government established that on another tunnel job in 1954, channel lagging had been turned inward and notched in order to reduce the excavation and concrete pay quantities (Wanship Dam).¹⁷

¹¹ Government's Statement of Position, page 5.

¹² Tr. 46.

¹³ Tr. 46.

¹⁴ Government's Post-Hearing Brief, p. 9.

¹⁵ This definition was supplied by a Government engineer. Tr. 106.

¹⁶ Tr. 94-95.

¹⁷ Tr. 90.

This also may have been done in 1959, at another project (Steinaker Dam). The appellant's tunnel superintendent at the Joes Valley Dam had served as tunnel superintendent at the Wanship Dam; however, neither Mullen's construction manager nor its chief engineer were aware, at the time the bid was calculated and submitted, of the Bureau of Reclamation's expedient of reversing and notching channel lagging.¹⁸ The isolated instances of lagging reversal and notching relied upon by the Government will not support a conclusion that such reversal and notching was a conventional or normal practice. The Board finds that Mullen, having selected channel lagging as allowed by the specifications, was justified in calculating its bid in the expectation that the B line would be positioned five inches outside of the outer face of the steel ribs.

The Government's right to approve or disapprove details of fabrication and installation did not place Mullen in the Government's unrestrained power in violation of the tenets of mutuality of obligation.¹⁹ The appellant prepared its bid contemplating the use of reasonable construction methods and its forces were at the project site carrying out the chosen methods at the time of the change. The Government in arriving at a proposed equitable adjustment followed an approach that was too technical or cut and dried.²⁰ A convincing showing has not been made that the appellant had an opportunity to recoup the costs which were included in its calculations based upon the five-inch line. Therefore, this appeal is sustained.

The Equitable Adjustment

We start with the appellant's entitlement to payment at unit prices for 116 cubic yards of excavation and concrete, for a total of \$11,948. Although the appellant asserts that it was an insignificant factor, we find that the Government has established that in one respect there was a substantial benefit to the appellant's tunneling operations from the change. If the legs of the channel lagging had been turned toward the rock in accordance with Mullen's original plan, some dirt and debris from the tunnel roof would have sloughed into the "U" of the

¹⁸ Tr. 107, 108.

¹⁹ *Albert C. Rondinelli*, ASBCA Nos. 9900 & 10197 (February 26, 1965), 65-1 BCA par. 4674.

²⁰ The term "equitable adjustment" in itself precludes the idea of there being any one cut and dried method of arriving at the end desired. *John A. Quinn, Inc.*, IBCA-174 (November 29, 1960), 67 I.D. 430, 60-2 BCA par. 2851.

INC., FRAZIER-DAVIS CONST. CO., AND HURLEY CONST. CO.

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channel.²¹ This would have created a cleanup problem for the contractor which was eliminated by the turning over of the "U." Because of the above-described benefit this portion of the claim allowance is reduced to \$9,500.

The second disputed cost element also is related to the reversal of the channel legs. The appellant seeks \$2,000 for additional re-tightening of wood blocking that allegedly was necessary because once the "U" was turned around blocking could not be made stable by being placed in the "U." If the blocking could have been placed in the "U," the portion inserted between the flanges would have been confined by the flanges. Upon review of the conflicting estimates²² of the excess expense that resulted from reduced stability of blocking, the Board finds that this item should be allowed in the amount of \$600.

Conclusion

The excavation and concrete quantities claim is sustained in the amount of \$9,500. The blocking claim is allowed in the amount of \$600. The remainder of the appeal is denied.

DEAN F. RATZMAN, *Chairman.*

I CONCUR:

I CONCUR:

WILLIAM F. MCGRAW, *Member.*

THOMAS M. DURSTON,

Deputy Chairman.

APPEAL OF WINSTON BROTHERS COMPANY, FOLEY BROTHERS, INC., FRAZIER-DAVIS CONSTRUCTION COMPANY, AND HURLEY CONSTRUCTION COMPANY

IBCA-625-2-67

Decided May 22, 1967

Rules of Practice: Evidence—Contracts: Construction and Operation:
Third Persons—Contracts: Disputes and Remedies: Generally

A motion by appellant for an order directing the Government to produce for inspection and copying, documents relating to the drafting, approval and promulgation of certain regulations will be denied without prej-

²¹ Tr. 82.

²² Tr. 56-58, 83.

udice to its later removal where it appears that the appellant has not taken advantage of inspection and copying rights accorded by the Government bodies in possession of such documents, in accordance with the regulations of those agencies.

BOARD OF CONTRACT APPEALS

This is a motion by the appellant for an order directing the Government to produce certain documents for inspection and copying. The dispute underlying the appeal arose as a consequence of the enactment of the Social Security Amendments of 1965,¹ which became effective after the contract was awarded. Because that Act increased social security taxes the contractor claimed it was entitled under Article 9 of the General Conditions of the contract to be reimbursed for its additional costs resulting from the increase. Article 9 concerns Federal, State and local taxes. The Government, however, maintains that it is inapplicable to social security taxes.

The clause which constitutes Article 9 is identical with the clause set forth in section 1-11.401-1(c) and similar to the clause contained in section 1-11.401-2(d) of the Federal Procurement Regulations.² Since the inclusion in the contract of the clause designated as Article 9 is made mandatory by the Regulations,³ the appellant contends that the intent of the drafters of these sections is "relevant and material" to its appeal. For this reason, the appellant is seeking to inspect and copy:

All minutes, memoranda, reports, letters and other writings by representatives of the Government, or committees, or other groups of such representatives, having responsibility therefor, relating to the preparation, drafting, approval and promulgation of Sections 1-11.401.1 [sic] and 1-11.401.2 [sic] of the second edition of the Federal Procurement Regulations issued June 1964, 29 F.R. 10102, relating to standard contract clauses concerning Federal, State and local taxes, as well as all similar writings relating to Section 1-11.401.1 as set forth in the first edition of the Federal Procurement Regulations, issued March 17, 1959, 24 F.R. 1966, insofar as any of the said documents relate to the application of said standard clauses to social security taxes or increases in the rates of the same.

and

All instructions, memoranda, letters, regulations, interpretations and other writings by representatives of the Department of the Interior, interpreting,

¹ 79 Stat. 343, 396, 26 U.S.C., sec. 3111 (Supp. I, 1965).

² 41 C.F.R., Ch. 1 (1966).

³ 41 C.F.R., Sec. 1-11.401-1(a) (2) (1966).

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applying and implementing the provisions of the Federal Procurement Regulations set forth in Item 1 [quoted *supra*] and the standard clauses contained therein; insofar as such documents relate to the application of the said regulations and standard clauses to social security taxes, or increases in the rates of the same.

The Government does not oppose the granting of this motion categorically. It states that it "is in accord with appellants' desire to conduct a full and open presentation of the facts which are pertinent to the issues involved in this appeal."⁴ The Government objects "only" to the production of "those documents which are personal in nature and contain solely personal opinions in connection with the drafting, approval and promulgation of the pertinent sections of the Federal Procurement Regulations and pertinent clauses of standard forms of Government contracts."⁵

Without specifically passing on the substance of the Government's limited objection to the granting of appellant's application, we believe the general objective of this motion—the effort to ascertain the intent of the regulations in question—is meritorious. We are also mindful of the tenor of the amendment of section 3 of the Administrative Procedure Act, to become effective on July 4, 1967,⁶ regulating the availability to the public of Governmental records. Nevertheless, the motion should be denied, for the reason that it is premature.

The appellant has not shown that resort must be had to this Board to obtain the documents sought. Both the General Services Administration, the agency charged with promulgating the Federal Procurement Regulations, and the Department of the Interior have established procedures governing the release of their records to the public.⁷ In the

⁴ Objection to appellant's Motion for Production of Documents.

⁵ *Ibid.*

⁶ P.L. 89-487, 80 Stat. 250. The amendment is popularly referred to as the "1966 Public Information Act," or the "Freedom of Information Act."

⁷ General Services Administration: 41 C.F.R., Pt. 101-12 (1966); Department of the Interior: 43 C.F.R., Pt. 2 (1966). We recognize that in *Vitro Corporation of America*, IBCA-376 (August 6, 1964), 71 I.D. 301, 1964 BCA par. 4360, this Board held that the procedure contained in 43 C.F.R., Pt. 2, is not exclusive and that the Board has concurrent jurisdiction over records sought in connection with a pending contract appeal. However, in *Vitro* the documents to be produced were actually matters related exclusively to that contract. The procedure followed in *Vitro* should be restricted to that type of request. Here the items sought, if they do exist, are of a general, Departmental nature, unrelated to this specific contract, and not within the files of the Bureau of Reclamation (the contracting bureau).

case of General Services Administration, "records * * * will be made available to persons properly and directly concerned, except records relating solely to internal management or otherwise requiring non-disclosure in the public interest."⁸ The Interior Department regulation provides:

Unless the disclosure of matters of official record would be prejudicial to the interest of the Government, they shall be made available for inspection or copying, and copies may be furnished, during regular business hours at the request of persons properly and directly concerned with such matters. * * *⁹

It would appear to us that the appellant is "properly and directly concerned" under either rule. We, of course, do not pass at this time on the question of whether disclosure is "in the public interest" or "interest of the Government."

Both the General Services Administration and Interior regulations set forth the manner of making application for their records. General Services Administration requires that the request be in writing and that it "identify as exactly as may be the particular documents desired."¹⁰ Interior provides that an unsuccessful applicant may appeal to the head of the bureau or office responsible and then, if necessary, to the Secretary from a refusal of a request to inspect and copy.¹¹ The appellant has not alleged that it complied with these procedures. It has not shown that it previously sought, without success, to obtain the information through the established channels.

The motion is, therefore, denied in its entirety without prejudice to renewal upon exhaustion of appellant's presently available remedies.¹²

DEAN F. RATZMAN, *Chairman.*

I CONCUR:

THOMAS M. DURSTON, *Deputy Chairman.*

⁸ 41 C.F.R., Sec. 101-12.101-3 (1966).

⁹ 43 C.F.R., Sec. 21 (1966).

¹⁰ 41 C.F.R., Secs. 101-12, 101-4(a), 101-12, 101-4(b) (1966).

¹¹ 43 C.F.R., Secs. 2.2(a), 2.2(b) (1966).

¹² In the event that this motion is granted, upon subsequent renewal, insofar as documents in the custody of GSA are concerned, as the parties have themselves recognized, this Board may only request that such documents be made available. This Board is powerless to compel GSA to produce documents in the custody of GSA. *Cerro Copper & Brass Company*, GSBGA No. 1964 (October 26, 1966), 66-2 BCA par. 5935.

FRANK WINEGAR, SHELL OIL COMPANY, D. A. SHALE, INC.

A-30804

Decided June 12, 1967

Confidential Information—Public Records—Mining Claims: Contests

Although reports by Departmental personnel on their examinations of mining claims are generally considered as confidential intra-departmental communications which are not to be made available to mining claimants, disclosure of the factual information in such reports will be permitted.

74 I.D. No. 6

REQUEST FOR INSPECTION OF DOCUMENTS

Frank Winegar and D. A. Shale, Inc., through their attorneys, have filed, as provided in 43 CFR 2.2, requests to inspect and copy reports of field examinations made of certain oil shale placer claims in Colorado.

Frank Winegar and Shell Oil Company are the owners of unpatented oil shale mining claims named Mountain Boy Nos. 1, 6 and 7 for which patent application C-023661 was filed on September 18, 1958. D. A. Shale, Inc., is the owner of similar claims named the Harold Shoup Nos. 1 through 4 and the K. C. Schuyler Nos. 2 and 3 for which it filed a mineral patent application C-050450 on September 29, 1960. The United States has instituted a contest against the claims in each application, Colorado 359 and 360, which have been consolidated for hearing.

At a prehearing conference, the parties agreed that the proceedings would be bound "insofar as practicable" by the Federal Rules of Civil Procedure. At a later prehearing conference, the mining claimants requested the hearing examiner to direct the contestant to make available to them for examination and copying the reports of mineral examiners who had investigated the claims. The hearing examiner denied the requests on the ground that he was bound by decisions of the Department holding that such reports are confidential and are not open to examination.

The applicants offer as grounds in support of their requests:

- (1) The pertinent regulation, *supra*, confers upon the Secretary the authority to order disclosure.
- (2) The reports bear directly upon the central issue in the contests.
- (3) The contestant seeks to have the contestee comply with rule 34 of the Federal Rules of Civil Procedure while refusing to do so itself.
- (4) Refusal to produce the documents might be held on judicial

review of the contest cases as grounds for a retrial, a consequence which should be avoided in view of the importance of the contests and the probable length of the proceedings.

(5) The reports would have to be disclosed under the provisions of the "Freedom of Information" statute, act of July 4, 1966, 80 Stat. 250, 5 U.S.C.A. § 1002 (Supp. 1966), amending section 3 of the Administrative Procedure Act of June 11, 1946, 60 Stat. 238.

The Regional Solicitor, Denver, has filed a brief opposing the applicants' request on the grounds that the applicants, as contestees who have agreed to follow the discovery provisions of the Federal Rules of Civil Procedure, should not be permitted to resort to the procedure set out in the Department's regulation for making documents available to the public, that the applicants are attempting to obtain a review of an otherwise unappealable interlocutory ruling, that disclosure of the reports is not required by Rule 34, and that the "Freedom of Information" statute exempts from disclosure certain classes of documents and the reports fall within one of the exemptions.

In a letter dated April 24, 1967, the applicants say that their request is an independent original application filed under the Department's regulation which is applicable whether or not litigation is pending, that their discussion of the contest proceedings was presented solely to set matters in context, that it is not an interlocutory appeal, that the Regional Solicitor's objections are beside the point, and that the importance of the litigation supports their request that the highly relevant evidence in the reports should not be suppressed.

While the applicants in their initial requests may have been somewhat ambiguous in stating the basis for their petitions, their latest letter makes it plain that they are relying solely upon the Department's regulation governing the availability of official records to support their request. We will consider it on this basis.

We examine first the Regional Solicitor's contention that the applicants are limited by the agreement made at the prehearing conference to be bound by the Federal Rules of Civil Procedure and that they cannot now switch to the Department's own disclosure procedures. We can find no basis for this view. It may be that a contestee has no greater rights to examine official records than a member of the general public, but that he should have less is a novel concept. The agreement made to regulate the conduct of the hearing, whatever its exact application, does not deprive the applicants of privileges available to all. It would be an unusual result to deny access to an official

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document to these applicants while holding it open to inspection by anyone else.¹

Turning now to the applicants' reasons, we note first their assertion that the documents should be made available to them under the "Freedom of Information" statute (*supra*). We do not agree. The statute exempts from its provisions, among others, "inter-agency or intra-agency memorandums or letters which would not be available by law to a private party in litigation with the agency" and "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party." Administrative Procedure Act § 3(e) (5) and (7). In our opinion mineral reports fall within one or both of these exemptions.

The applicants' other reasons, except for the one based on the Department's regulations, are not sufficient to warrant disclosure beyond that discussed hereinafter.

The issue, then, is what are the applicants' rights under the Department's regulation which states that

* * * Unless the disclosure of matters of official record would be prejudicial to the interests of the Government, they shall be made available for inspection or copying * * * at the request of persons properly and directly concerned with such matters * * *. 43 CFR 2.1.

The Department has restated several times in recent cases its position that reports by Bureau personnel of their examination of mining claims are generally considered as confidential intra-departmental communications which are not to be made available to mining claimants, but that, under special circumstances, either an entire report will be opened to inspection or disclosure will be limited to the factual information in the report. *Herbert H. Blakemore et al.*, 72 I.D. 248 (1965); *United States v. Julius S. Foster et al.*, *supra* fn. 1.

In considering an analogous situation, the Department's Board of Contract Appeals reviewed the statutory and Departmental bases governing the disclosure of certain intra-office communications and reports. *Appeal of Vitro Corporation of America*, 71 I.D. 301 (1964). It reasoned that all documents which are privileged, as that term is used within the law of evidence, are comprehended within the phrase "prejudicial to the interests of the Government." It then reviewed the leading cases treating demands to produce documents made upon the Government pursuant to Rule 34, *supra*, and held that a determina-

¹ In *United States v. Julius S. Foster et al.*, A-28252 (January 25, 1961), the mining claimants filed a request to inspect and copy certain documents during the pendency of a contest against the claims. See also *Foster L. Mills et al.*, A-29330 (January 14, 1963).

tion to limit disclosure to factual items in an otherwise privileged report was consistent with the applicable precedents (*Id.*, pp. 309-310).

The courts have reached the same result. *Machin v. Zuckert*, 316 F. 2d 336, 340 (D.C. Cir. 1963), *cert. denied* 275 U.S. 896 (1963); *O'Keefe v. Boeing Co.*, 38 F.R.D. 329 (S.D.N.Y. 1965).

In a recent decision, it was held that intra-agency correspondence discussing the course of conduct to be followed by the National Labor Relations Board and expressing opinions as to the merits of various claims presented to the agency enjoys at least a qualified privilege, which in the absence of special circumstances shields it from examination by the public. *Davis v. Braswell Motor Freight Lines, Inc.*, 363 F. 2d 600 (5th Cir. 1966). The court said:

* * * The documents discuss the actions to be taken by the parties to the correspondence and reveal tentative opinions as to the probable validity of various charges made by Braswell and the unions. With the exception of these two categories of information, the documents do not contain any factual information not already well known to the parties. The asserted purpose of the subpoena was to uncover evidence concerning the Board's findings or determinations, whether preliminary, temporary or final, on the status of the unions as representatives of the employees of Braswell. Under the circumstances in this case, we conclude that this objective cannot be satisfied in this manner and that, therefore, the subpoena should have been quashed. p. 603.

It then quoted Justice Reed's observation in *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939, 45-946 (Ct. Cl. 1958):

* * * Here the document sought was intra-office advice on policy, the kind that a banker gets from economists and accountants on a borrower corporation, and in the Federal government the kind that every head of an agency or department must rely upon for aid in determining a course of action or as a summary of an assistant's research. In the case of governments "[t]he administration of justice is only a part of the general conduct of the affairs of any State or Nation, and we think is (with respect to the production or non-production of a State paper in a Court of justice) subordinate to the general welfare of the community." Free and open comments on the advantages and disadvantages of a proposed course of governmental management would be adversely affected if the civil servant or executive assistant were compelled by publicity to bear the blame for errors or bad judgment properly chargeable to the responsible individual with power to decide and act. Government from its nature has necessarily been granted a certain freedom from control beyond that given the citizen. It is true that it now submits itself to suit but it must retain privileges for the good of all.

There is a public policy involved in this claim of privilege for this advisory opinion—the policy of open, frank discussion between subordinate and chief concerning administrative action. Pp. 603-604.

These considerations, we believe, are equally valid here and fully justify nondisclosure of anything other than purely factual portions

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of the reports. Therefore, it is our conclusion that only the factual parts of the reports, including all the attachments, are to be made available to the applicants.

We think the State Director, Colorado State Office, Bureau of Land Management, in whose custody the reports would regularly be, is the proper person to examine the reports and decide which portions of them are to be opened to the applicants. The State Director should inspect them and their attachments and inform the applicants when they are ready for inspection and copying.

FRANK J. BARRY,
Solicitor.

ISSUANCE OF MINERAL LEASES TO PARTNERSHIPS

Mineral Leasing Act: Generally

A partnership composed exclusively of United States citizens may hold a lease or permit issued under the Mineral Leasing Act.

Associate Solicitor's Opinion, M-36463, 64 I.D. 351 (1957) Overruled

M-36706

June 12, 1967

To: SOLICITOR

SUBJECT: ISSUANCE OF MINERAL LEASES TO PARTNERSHIPS.

We have been recently asked whether a partnership may hold in its own name a lease or permit under the Mineral Leasing Act of February 25, 1920, as amended and supplemented (30 U.S.C., secs. 181-283). It has been pointed out that *Associate Solicitor's Opinion, M-36463*, approved by the Deputy Solicitor, 64 I.D. 351 (1957), held that a partnership could not hold a lease in its own name. Our reconsideration of this Opinion has been requested.

Section 1 of the Mineral Leasing Act, as amended (30 U.S.C., sec. 181), provides that leases and permits may be issued "* * * to citizens of the United States, or to associations of such citizens, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, or in the case of coal, oil, oil shale, or gas, to municipalities."

In 1957 the Associate Solicitor ruled that a partnership did not qualify as an association within the terms of section 1. He pointed out that a partnership may not hold title to real property unless it has

been authorized to do so. Such authorization could come only from a statute of the State under the laws of which the partnership was formed. The Associate Solicitor took the position, at p. 352, that it could not be presumed that "Congress intended the identity of its lessees to depend on the varying laws of the several States." We do not agree with this line of reasoning. In the very same sentence of section 1 Congress provided that a lease might be issued "to any corporation organized under the laws of the United States, or of any State or Territory thereof * * *." The fact that any corporation (organized under the laws of a State) may hold a lease thus depends ultimately upon the law of its State of incorporation, as well as its own corporate articles, and we must, therefore, conclude that the Congress did intend to allow "the identity of its lessees to depend on the varying laws of the several States."

The Associate Solicitor also stated on page 352 that a lease may not be issued to an association of persons in the name of the association, but only in the names of the individual persons. He said that a corporation was really an association of persons, but that it had been distinguished from other associations in the statute because section 1 specifically allowed corporations to receive leases in their own names. The fact that the issuance of a lease to a corporation in its own name had been specifically authorized was evidence that the Congress had not intended to permit the issuance of a lease to a partnership in its own name. This argument we do not find convincing.

Although created by an association of persons a corporation has a legal identity of its own and is not ordinarily regarded as an association of persons. Indeed, in some situations a corporation is not in any respect an association of persons, since it is, for example, possible to have a corporation sole. We have no reason for believing that the Congress was regarding corporations as associations of persons when it enacted section 1.

In summary, we find nothing persuasive in M-36463 on the question of whether a partnership may take and hold oil and gas leases. Therefore, we have looked at the statute itself and its legislative history to see whether there is any justification for holding that a partnership may not take a lease in its own name.

The provision about issuing leases to "associations of such citizens" has been in the Mineral Leasing Act from its enactment in 1920. Moreover, it had appeared in S. 2775 of the 66th Congress which was introduced on August 15, 1919, and was subsequently enacted as the Mineral Leasing Act. We have gone through the legislative history and have found no reference to the specific meaning of this provision.

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Having no legislative history to guide us on this point, we are limited to the ordinary meaning of the words used in the statute. The statute refers to "associations of such citizens." Using the terms "associations of persons" or "associations of individuals" which would be the same as the statutory term except for the requirement of citizenship would be a typical method of referring to partnerships. A partnership is defined in Black's *Law Dictionary*, 4th ed. (1951), at p. 1277 as "An association of two or more persons to carry on as co-owners a business for profit."

Many judicial holdings support this definition. The Court of Claims has held that "For Federal tax purposes in absence of a specific statutory provision to the contrary, a partnership is * * * considered * * * as an association of individuals who are vested with an interest in the specific property of the partnership." * * * *City Bank Farmers Trust Co. et al. v. United States*, 47 F. Supp. 98, 103 (Ct. Cl., 1942). The Federal courts have also said that to constitute a partnership "Undoubtedly, there must be an association of two or more persons for the purpose of carrying on a trade or business or adventure together and dividing the profits. The presence or absence of certain other incidents of a partnership by special arrangement between the parties would not seem to be of the essence of the matter." * * * *Fechteler et al. v. Palm Bros. & Co.*, 133 Fed. 462, 466 (6th Cir. 1904). The Illinois courts have said "where there is an association of individuals for producing oil or minerals from property, and the expenses of development and production and sale of the oil are divided and shared according to the holdings of the members in the leasehold property, a partnership exists." *Kinne et al. v. Duncan et al.*, 48 N.E. 2d 375, 377 (Ill. 1943). A New York court has stated that "A partnership is an association of two or more persons to carry on, as co-owners, a business for profit." *Keen v. Jason*, 187 N.Y.S. 2d 825, 827 (Sup. Ct. 1959).

Thus, it is quite clear that the ordinary definition of a partnership is an association of persons or individuals. Clearly then the term "association of citizens" would seem to include within its meaning a partnership.

Section 1 says that the lease or permit shall be issued to an association of citizens. It does not say that it will be issued to the individual members of that association as M-36463 ruled. The simple and obvious reading of section 1 is that a lease or permit may be issued to an association of citizens in the name of the association. A partnership composed of citizens would be such an association. Consequently, a lease or permit may be issued to a partnership in its own name.

Two qualifications must be made: (1) a partnership, in order to hold a lease in its own name, must be composed exclusively of citizens; (2) a partnership, like a corporation, may hold a Federal oil and gas lease which is an interest in real property only if it is authorized to hold such interests by the statute under which it is formed and by the instrument establishing it.

Upon your approval of this memorandum, *Associate Solicitor's Opinion, M-36463* will be overruled to the extent that it is inconsistent with this opinion.

THOMAS J. CAVANAUGH,
Associate Solicitor.

APPROVED:

EDWARD WEINBERG,
Deputy Solicitor.

CURTIS E. THOMPSON

A-30743

Decided June 14, 1967

Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Lands Subject to

Where land was conveyed to the United States under a deed in which the grantor reserved oil and gas rights in the conveyed land "for a primary period ending June 30, 1965," title to the oil and gas deposits in such land did not vest in the United States until July 1, 1965, and an acquired lands oil and gas lease offer filed for the land on June 30, 1965, is properly rejected as prematurely filed.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Curtis E. Thompson has appealed to the Secretary of the Interior from a decision dated September 14, 1966, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed separate decisions of the Eastern States land office rejecting his noncompetitive acquired lands oil and gas lease offers Eastern States 02 and 03, filed pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359 (1964).

The appellant filed his lease offers on June 30, 1965, for lands in Ts. 11 N., Rs. 4 and 5 W., and in Ts. 7 N., Rs. 1 W. and 1 E., La. Mer., Louisiana, respectively. The record shows that all of the lands described in the two lease offers were acquired by the United States for addition to the Kisatchie National Forest by warranty deeds under which the grantors reserved oil and gas rights in the conveyed lands "for a primary period ending June 30, 1965."

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On August 2, 1965, Geraldine H. Rubenstein, whose lease offer Eastern States 022 described the same lands as appellant's lease offer Eastern States 02, filed a protest against appellant's offer on the ground that it was prematurely filed. On August 11, 1965, Marilyn Meinhart, whose lease offer Eastern States 016 conflicted with appellant's lease offer Eastern States 03, filed a similar protest against the allowance of that offer.

By a decision dated August 16, 1965, the land office rejected appellant's lease offer Eastern States 03, with other offers, for the reason that complete title in the minerals applied for vested in the United States on July 1, 1965, and the rejected offers were prematurely filed on June 30, 1965. By a decision of August 19, 1965, the land office similarly rejected lease offer Eastern States 02 with other offers.

In response to appellant's contention that the reservation of oil and gas rights in the deeds to the United States expired on the first instant of June 30, 1965, and that title vested in the United States at the same moment, the Office of Appeals and Hearings found that the Louisiana courts have held that similar language, *i.e.*, "for a period ending * * *," includes all of the day on which the period ends, citing *Landry v. Flaitz*, 148 So. 2d 360 (La. 1962), and *Wehran v. Helis*, 152 So. 2d 220 (La. 4th Cir. 1963). It concluded, therefore, that title to the oil and gas did not vest in the United States until the day following the date *ad quem* in the warranty deeds to the United States, or on July 1, 1965. Since the lands were not available for leasing at the time the offers were filed, the Office of Appeals and Hearings stated, the offers were properly rejected, citing *Edwin D. Warren*, A-29720 (September 24, 1963).

In his present appeal Thompson contends that the decisions relied upon by the Bureau, while properly stating the law relating to the performance of contractual obligations, are not applicable to a deed of conveyance. He further argues that in *O. B. Mobley, Jr.*, BLM-A 052682 etc. (December 11, 1962), the Bureau of Land Management rejected the use of rules of construction applicable to performance-type contracts in determining the date on which title vests in the United States under a deed to the United States conveying land in the State of Louisiana.

The appellant's theory requires a strained interpretation of the law. In essence, he argues that because it has been held that a period which begins on a given day begins to run from the first moment of that day it must follow that a period which ends on a specified day

terminates at the first instant of that day.¹ The latter proposition, however, does not necessarily follow the former as a matter of logic, and from the decisions, and the discussions of the pertinent principles of law, we think that appellant's view does not represent the law generally or, more specifically, the law of Louisiana.

The rule generally followed in the computation of a period of time, which appellant acknowledges as being applicable here, is that a day is to be considered as an indivisible unit or period of time, that fractions of days are disregarded, and that every part of any day is one day after every part of the preceding day and one day before every part of the day to follow.

* * * [F]ractions of a day are not generally regarded in judicial proceedings, and accordingly, such proceedings take effect in the earliest period of the day upon which they originated and came into force. And since the law usually rejects fractions of a day, when an act is required by a contract to be performed on a specified day, its performance is not referable to any particular portion of that day, but may be performed at any period within its compass. A contract to take effect at a designated hour of the day and to remain in effect for a term of months or years generally is considered to remain in effect *during the whole day of expiration* * * *. 52 Am. Jur., Time, § 15 (Italics added); see 86 C.J.S. Time § 16.

Under the general rule just set forth, then, where the beginning and ending dates of an interest or estate are defined, that estate continues from the first instant of the first day specified through the last instant of the last day named, and it necessarily follows that the preceding interest must have terminated the day before the defined estate commenced and that a succeeding interest does not vest until the day following the termination of the defined estate. In the present case this would mean that the grantors' estates did not terminate until the last

¹ In *Humble Oil & Refining Company*, 64 I.D. 5 (1957), a case relied on by appellant to support the construction which he advocates, the Department held that relinquishments of oil and gas leases which were filed on the first day of the lease year had the effect of terminating the leases, *eo instanti*, as of the first moment of that day and that the lessee was not obligated to pay advance rentals which otherwise would have accrued on that same date. Appellant insists that under this rule the mineral estate reserved under the deeds to the United States vested in the grantee at the first instant on June 30, 1965. The simplest, but by no means the only, distinction that may be made between that case and the present one is that the former involved administrative interpretation of specific statutory and regulatory provisions relating to the leasing of federally owned oil and gas deposits. It does not necessarily state the law applicable to questions pertaining to the vesting of title to land in Louisiana, which are governed by the law of the State in which the land is situated. See *DeVaughn v. Hutchinson*, 165 U.S. 566, 570 (1897); *Clarke v. Clarke*, 178 U.S. 186, 191 (1900). Here it is interesting to note that, while appellant denies the applicability of decisions of the Louisiana courts dealing with oil and gas leases to questions pertaining to conveyance by deed, he relies almost entirely upon a decision of this Department interpreting the mineral leasing laws of the United States to support his interpretation of a provision of a deed conveying land in Louisiana.

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moment of June 30, 1965, and that title to the oil and gas deposits underlying the lands in question did not vest in the United States until the first moment of July 1, 1965.² It appears clearly that the same principle prevails in Louisiana, at least insofar as it pertains to the date of termination.

In *Wehran v. Helis*, *supra*, one of the cases relied upon by the Bureau, the court dealt specifically with a problem which is not present here, *i.e.*, ascertaining the expiration date of oil and gas leases which were to run for a term of five years from July 20, 1953. It is evident, however, from the numerous references in that decision to expiration dates of leases in the cases cited that it was understood, without argument, that a lease which "expires" on a determined day continues in effect until the last moment of that day.³ We know of no reason, and none has been suggested, for finding that "ending on" and "expiring on" have substantially different meanings.

With respect to appellant's contention that *Wehran v. Helis*, *supra*, does not state the law applicable to deeds we note that the court, after

² This rule was followed by the Department in *S. J. Hooper*, 61 I.D. 346, 347 (1954), without any suggestion that there was a question as to when title vested in the United States under a deed worded similarly to those in question here.

³ The court stated, *inter alia*, that:

"It is universally held that unless a contrary intent is specifically shown a 'year' means a calendar year. Likewise fractions of a day are considered a whole day. Therefore it is clear that if the date of execution of the leases is *included* in the five-year period, the primary term of the leases terminated at midnight July 19, 1958. On the contrary if the date of execution is *excluded* the primary term expired at midnight July 20, 1958.

* * * * *

"In *Taylor v. Buttram*, La. App., 111 So. 2d 576 (2d Cir. 1959), the Court said:

"The oil and gas lease in question has a primary term of ten years and was dated December 7, 1937, which means that the same expired on December 7, 1947 * * *."

"In *Pace Lake Gas Company v. United Carbon Co.*, 177 La. 529, 148 So. 699 (Sup. Ct. 1933), the Supreme Court said that a lease dated May 2, 1924, for a term of five (5) years expired on May 2, 1929.

"In *Landry et al. v. Plaitz et al.*, La. App., 148 So. 2d 360 (1st Cir. 1962) the First Circuit Court of Appeal in referring to a lease dated March 29, 1957, stated that the lease was for a primary term of three years ending March 29, 1960, and that the Commissioner's Order (dated March 28, 1960) was issued one day prior to the expiration of the primary term.

* * * * *

"In *Petersen v. Robinson Oil & Gas Company* * * * [356 S.W. 2d 217 (Tex. Civ. App., 1952)] the Court held that a lease dated March 27, 1947, for 'a term of ten years from this date' would have expired at midnight on March 27, 1957 had not the drilling contractor staked a location and commenced drilling operations on that date." 152 So. 2d at 226, 228-229.

Following appellant's reasoning, we would be justified in asking, in each of the instances cited, whether the court meant that the lease expired at the beginning or ending of the designated expiration date, a question which, if meritorious, would leave each of the determinations without a decisive decision.

* * * * *

citing in that decision the Louisiana statutory provision for the computation of time in contractual matters, stated:

The District Judge held that the primary term of the leases expired at midnight July 19, 1958, his reasoning being that a mineral lease is not a contract in which there is an obligation to do, to perform, or not to do, and therefore Article 2058 *et seq.* of the Civil Code are inapplicable. The District Judge then concluded that the date of the leases is to be included in determining the term of the leases, citing *Baker v. Potter*, 223 La. 274, 65 So. 2d 598; *Ratcliff v. Louisiana Industrial Life Insurance Company*, 185 La. 557, 169 So. 572; *Housing Authority of the Town of Lake Arthur v. T. Miller & Sons*, 239 La. 966, 120 So. 2d 494. * * *

We do not consider it necessary to decide whether the leases contain an obligation to do, or to perform, or whether Article 2058 *et seq.* of the Code are applicable to a mineral lease. If the codal rules are not applicable it does not follow that the converse of the rules must be applied. 152 So. 2d at 227.

The court then proceeded to find, "considering the ordinary meaning of the words 'from this date' and the general rule relative to the interpretation of such words, that the date *a quo* should be excluded and the date *ad quem* included in the calculation of the term of the leases," from which it concluded that the primary term of the leases there under consideration did not expire until midnight July 20, 1958.⁴

The reasoning of the court may be properly extended to the present case, for it seems obvious that, whatever the limits may be in applying rules applicable to leases to the conveyance of real estate, it does not follow that, because the laws applicable to mineral leases do not necessarily govern the conveyancing of real estate, "the period ending" means one thing when used in an oil and gas lease and something entirely different when used in a deed of land. In the absence of some basis for such a distinction we can only conclude that the meaning is the same in either situation.

Appellant does not appear to challenge the Bureau's finding that a lease offer filed before land becomes available for leasing is to be

⁴The court's conclusions cast some doubt upon the distinction between contract law and real property law in Louisiana, relied upon by the Bureau of Land Management in the *Mobley* decision, *supra*, cited by appellant in support of his argument. In that case the United States took title to land under a deed in which the grantor reserved the mineral rights in the land conveyed "for a period of twenty-five years from August 10, 1935." The Bureau, after acknowledging the general rule that in the computation of a period of time to run from a given date the beginning date is excluded from the period, found the rule with respect to a conveyance of real property to be that the given date is included in the period of time provided for in the absence of an expression of intent to the contrary on the part of the parties to the conveyance.

It is not necessary now to pass upon the correctness of the Bureau's conclusions in that matter, for, as we have already pointed out, the deeds now in question specified the exact date on which the grantors' reserved interests were to terminate, and there is no problem here of determining the point from which a period of time is to be computed. Thus, the ruling in the *Mobley* case is immaterial to the issue now before the Department.

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rejected and not held in suspense until the land becomes available, and we find no error in the Bureau's determination that appellant's offers were properly rejected.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4) (a) ; 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

JACOB N. WASSERMAN

A-30767

Decided June 14, 1967

Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Applications: Generally—Oil and Gas Leases: Lands Subject to

Where land was conveyed to the United States under a deed wherein the grantor reserved all minerals, together with the right to mine, drill, remove and operate for such minerals "until November 4, 1965," with the express provision that if the reserved right to mine etc. "is not being exercised on November 4, 1965, then and upon said November 4, 1965, the said coal, oil, gas and minerals, and all rights thereunder shall become property of the Grantee," and the right was not exercised on that date, title to the minerals vested in the United States on the prescribed day, and acquired lands oil and gas lease offer filed the same day was properly accepted for consideration by the land office.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Jacob N. Wasserman has appealed to the Secretary of the Interior from a decision dated December 5, 1966, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Eastern States land office rejecting his noncompetitive acquired lands oil and gas lease offer Eastern States 0446, filed pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359 (1964).

Wasserman filed his offer on November 5, 1965, for 200 acres of land in sec. 4, T. 16 N., R. 15 W., Mich. Mer., in the Manistee National Forest, Michigan. The lands applied for were acquired by the United States under a deed executed on September 22, 1937, by Emma R. Hutchins wherein the grantor reserved "all coal, oil, gas and minerals in, upon and under the lands * * * together with the right to mine, drill, remove and operate for same until November 4, 1965, said rights subject to renewal by five (5) year periods, provided the right is being exercised at the end of any period. If, however, said right is

not being exercised on November 4, 1965, then and upon said November 4, 1965, the said coal, oil, gas and minerals, and all rights thereunder shall become property of the Grantee * * *."

By a decision dated August 16, 1966, the land office rejected appellant's offer for the reason that the lands described therein "are embraced in lease ES 0438, title-holder of record being George M. McAleenan."¹

On appeal to the Director, Bureau of Land Management, Wasserman contended that the reservation of minerals in the deed to the United States did not expire until November 4, 1965. It follows, he argued, that no effective filing could be made for an oil and gas lease until November 5, 1965, and that lease Eastern State 0438 was improperly issued. The Office of Appeals and Hearings, however, in affirming the rejection of appellant's offer found that the language of the deed unequivocally provided that title to the minerals should vest in the United States on November 4, 1965, if the right of renewal had not been exercised. Since there was no renewal, the Office of Appeals and Hearings stated, the minerals became the property of the United States on November 4, 1965, and became available for leasing on the same day.

In his present appeal Wasserman renews his contention that title to the minerals did not vest in the United States until November 5, 1965, asserting that the word "until" includes all of the specified day or that, in any event, the term used is ambiguous, that if the determination as to whether the grantor exercised her reserved right is to be made on, and not before, November 4, 1965, the reservation must continue through all of that day, and that the ambiguity, if any, was created by the United States and should be strictly construed against the grantee. Moreover, appellant contends, inasmuch as the assignment from Meinhart to McAleenan specifically negates any warranty of title, the assignee cannot qualify as a bona fide purchaser for value.

On behalf of the lessee it is argued that the word "until" excludes the date *ad quem* or that it is ambiguous in law but that the explanatory language in the deed makes it clear that title to the minerals vested in the United States on November 4, 1965, and that, even if title did not vest until November 5, the assignee must be protected as a bona fide purchaser.

From the arguments of the parties, and from a review of pertinent authorities it is abundantly clear that "until" is a word of exclusion

¹ Lease Eastern States 0438 was issued to Arthur E. Meinhart effective August 1, 1966, pursuant to a lease offer filed on November 4, 1965. The lease was assigned by Meinhart to McAleenan by an instrument approved effective September 1, 1966.

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or a word of inclusion, or that it is ambiguous in meaning, depending upon which rule one elects to apply. Thus, it has been stated that:

* * * It may be assumed that the preposition "until," like "from" or "between," generally excludes the day to which it relates. [Citations omitted.] In contracts and like documents, "until" is construed as exclusive of the day mentioned, unless it was the manifest intent of the parties to include it. Webst. Dict. "The use of the word 'until' generally implies an intention to exclude the day to which it refers, unless a contrary intention appears from the context of the statute or instrument in which the word is used." 26 Am. & Eng. Enc. Law, p. 9. The word "until" is exclusive in its meaning. A charter to continue until the 1st day of January expires on the 31st day of December. *People v. Walker*, 17 N.Y. 502. * * * *People v. Hornbeck*, 61 N.Y.S. 978 (1899). See *In re Wiegand*, 27 F. Supp. 725, 729 (S.D. Calif. 1939).

On the other hand it has been stated that:

The word until has been given in this state a meaning equivalent to until and including. We treat it as if used in the inclusive sense unless the intent to use it in another sense clearly appears. * * * *Marcum v. Melton*, 21 S.W. 2d 291, 292 (Ky. 1929).

The more general rule is that:

No general rule can be laid down to determine whether the word "until" is a word of inclusion or exclusion. A strictly literal definition would doubtless make it one of exclusion, but popular use is quite as likely to give it an inclusive as an exclusive sense. The use of the word in particular instances may be such as to leave no doubt as to the meaning, and, in such cases, the court will give it the meaning intended. Thus, if a lease is given until the 1st of April, there could be no question that it would expire with March; while, on the other hand, if a lender told a borrower that he could have the money borrowed until the 15th of the month, few people would doubt that repayment on the 15th would comply with the agreement. Annot., 16 A.L.R. 1094 (1922).

The applicable law here, of course, is that which is followed in Michigan, and it would appear that the general rule prevails in that State.

In *Hallock v. Income Guaranty Co.*, 259 N.W. 133 (Mich. 1935), a case which appellant cites in support of the proposition that "until" is a word of inclusion, and which the lessee contends is inapplicable to the issue here, action was brought under a health and accident insurance policy. The last premium notice received by the plaintiff stated that a quarterly premium of \$15 would become due and payable on or before November 29, 1932, and that payment thereof would extend the insurance until February 28, 1933. Although the premium was not paid until December 12, 1932, it was accepted by the company. The premium due on February 28, 1933, was not mailed until March 2, and

the defendant refused to accept it. The plaintiff incurred the disability upon which the action was based on February 28. In holding that the policy remained in effect through that date the court stated:

All ambiguities in a policy of insurance must be resolved in favor of the insured. [Citations omitted.] In order to avoid any question as to the exact period during which a policy is in force, it is frequently provided that its term shall begin at noon on a certain day and expire at noon on a certain subsequent day. The policy in the instant case contained no such provision. However, it has repeatedly been held that in ascertaining the time during which an act is to be performed, or an obligation remain in force, the date from which the contract runs is excluded, and the last day mentioned is included, in the calculation; it being the policy of the law to protect a right and prevent a forfeiture where this can be done without violating the clear intention or positive provision of the parties. [Citations omitted.] This rule has been applied to life insurance contracts. [Citations omitted.] Plaintiff's insurance therefore did not expire until midnight of February 28, 1933 * * *. P. 134.

The court did not, in fact, discuss the meaning of the word "until," although it seems clear from what it did say that the term has no fixed legal meaning in Michigan. The parties to the present dispute have not cited, and we have not found, a more explicit discussion of the problem by a Michigan court.

In the present case, however, the significance of the word "until" fades as a key to the interpretation of the deed in question, for the most that can be said for that word itself, under any rule of construction, is that it creates a presumption of intent to include or to exclude. Thus, under any of the three rules of interpretation set forth above, a clear expression of intent in the instrument of conveyance would prevail over any presumption as to the meaning of "until." The deed in the present case is not without its explanatory language.

Any ambiguity which may be found in the use of the word "until" should be removed by the clear expression that "then and upon said November 4, 1965, the said coal, oil, gas and minerals, and all rights thereunder shall become the property of the Grantee." The clarity of that provision, however, is somewhat clouded, and a measure of ambiguity is restored, by the prefatory condition that if the right reserved under the deed to mine, drill, remove and operate for the reserved minerals "is not being exercised on November 4, 1965," title to the minerals is to vest in the grantee.

There may be a question as to whether the grantor, in order to increase the period of the reservation of mineral rights under the deed was required to exercise the right of mining, drilling, removing or operating prior to November 4, 1965, or whether she had all of that day in

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which to commence any such operation. Since the right was not exercised at any time we find it unnecessary to determine that precise question.² The language of the deed was explicit in providing that if the right was not exercised title to the minerals should vest in the grantee on November 4, 1965.

Appellant would have the deed construed to provide that "if the grantor does not exercise the right on or before November 4, 1965, the coal, oil, gas and minerals, and all rights thereunder shall become the property of the Grantee on November 5, 1965." That, of course, is not what the deed provided, and we see no evidence that such was the intent of the parties. Thus, giving the language of the deed what we consider to be its plainest meaning, we concur in the findings of the Bureau that title to the minerals in the lands in question vested in the United States on November 4, 1965, and that the land office properly accepted an offer to lease the oil and gas deposits thereunder filed on that date. In view of this conclusion it becomes unnecessary to determine whether or not McAleenan qualifies as a bona fide purchaser of the lease interest of Meinhart.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

² Although we do not find any cases directly in point, we find nothing that would preclude a provision in a deed that title should vest in the grantee on a given date upon the condition that a specified act not be performed by the grantor by that date, assuming here that it was the intent of the parties to allow the grantor to exercise the reserved right through November 4, 1965. This Department, for example, applying the familiar rule that a day is an indivisible unit of time, and an action effective on a particular day is effective from the first moment of that day, has held the relinquishment of an oil and gas lease, filed at 9:30 a.m. on the anniversary date of the lease to be effective from the first instant of the day and to prevent the accrual of a rental obligation which, except for the filing of the relinquishment, would have accrued also from the first moment of the same day. *Humble Oil & Refining Co.*, 64 I.D. 5 (1957). In a similar vein, a court has held that the act of a State legislature validating certain school districts, provided there was no litigation on the validity of any district pending on the effective date of the act, did not validate a school district the validity of which was challenged in a proceeding commenced on the effective date of the validating act. *Ohlids et al. v. Board of Sup'rs of Webster County*, 128 So. 333 (Sup. Ct. Miss. 1930). Thus, we find nothing repugnant in a provision in a deed that titled to an interest conveyed should vest in the grantee on a specified date subject to the condition that an act performed on that same date would prevent the vesting of title at that time.

APPEAL OF ALLISON & HANEY, INC.

IBCA-587-9-66

Decided June 19, 1967

Rules of Practice: Appeals: Generally—Rules of Practice: Evidence

The overriding consideration in ruling upon requests for discovery is whether making available the information sought is consistent with the objective of securing just and inexpensive determination of appeals without unnecessary delay, with consideration given to (i) the attainment of that objective in the particular case; (ii) the showing made by the party seeking discovery; (iii) the claims of privilege asserted; and (iv) the likelihood of hardship resulting from granting particular requests. Absent hardship and privilege, the scope of inquiry may encompass any material relevant to the subject matter and need not be limited to the precise issues involved, even though such material may not be admissible as evidence at the hearing.

BOARD OF CONTRACT APPEALS

This appeal involves the interpretation of specifications concerning the encasement of pretensioned concrete pipe. The appellant, pursuant "to the Rules of" this Board "and the pre-trial Order entered in this cause," has served upon the Government documents entitled "Request For Admissions," "Motion For the Production of Documents," and "Interrogatories." The Government has objected to certain of the items propounded.

Under subsection (b) of section 4.4 of our rules, we "may empower or approve the taking of depositions, service of written interrogatories, inspection of documents and admission of facts generally in accordance with the procedures covering such matters established by the Armed Services Board of Contract Appeals." The ASBCA rules provide for depositions by means of oral examination and written interrogatories "for use as evidence in the appeal proceedings,"¹ as distinguished, simply, from written interrogatories to parties, inspection of documents, and admission of facts.²

The ASBCA will not ordinarily permit a deposition to be taken for ultimate use as evidence "unless it appears that it is impracticable to present deponent's testimony at the hearing of the appeal, or unless a hearing has been waived."³ Applications for permission to serve upon parties written interrogatories not designated specifically for use as evidence, to inspect certain documents, and to request admission of specified facts will not be entertained "as a matter of course," but only under "appropriate circumstances," and will be "approved

¹ 32 CFR Part 30, Appendix A, R. 14(a) (1966).

² *Id.*, R. 15.

³ *Id.*, R. 14(a).

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only to the extent and upon such terms as the [ASBCA] in its discretion considers to be consistent with the objective of securing just and inexpensive determination of appeals without unnecessary delay, and essential to the proper pursuit of that objective in the particular case.”⁴

It is questionable whether the appellant has complied with the ASBCA rules which we follow generally in the area of discovery. The request for the interrogatories is deficient in that it does not clearly state its purpose. In addition, there has been no allegation of “appropriate circumstances” which might entitle the appellant to inspect the documents sought and demand the admissions propounded. Rather, its application is grounded upon what it characterizes as a “pre-trial Order,” but which actually is a stipulation between the parties approved by the hearing official designated by the Board for a prehearing conference in reference to this matter. As we understand the stipulation the parties thereto merely recognized that certain documents would be requested for inspection and copying and that interrogatories would be propounded. The stipulation does not constitute an agreement as to specific items of information that would be furnished.

The ASBCA procedure in this field ordinarily should be adhered to; however, our rules permit us to deviate therefrom. In this case the Board will accept the stipulation of the parties as a substitute for the required showing of “appropriate circumstances.” Additionally, we have given great weight to the fact that the Government has acquiesced in most of the appellant’s demands.

The overriding consideration in all cases is whether granting the information sought is “consistent with the objective of securing just and inexpensive determinations of appeals without unnecessary delay, and essential to the proper pursuit of that objective in the particular case.” If that test is not met, discovery will not be allowed.

Severe restrictions will not be placed upon an application by a party to utilize requests for admission or interrogatories for discovery purposes. The requirement to furnish answers to interrogatories or requests for admissions, however, will not be imposed to the extent that hardship is likely to result.

In this appeal some degree of discovery is clearly advantageous. The contractor contends that interpretation of numerous provisions

⁴ *Id.*, R. 15.

of the contract will be required. A hearing has been requested. In anticipation of the hearing the Government has not provided a "detailed exposition" of its position. The proof in support of the alleged extra work performed (claimed by the appellant not to be called for by the specifications) is likely to be detailed and time-consuming. Discovery would appear to be calculated to expedite this matter. What we must determine is the extent of discovery to be allowed.

The Government objects to the following:

Request for Admissions

7. You are requested to admit that the contracting officer, prior to making his findings of fact and decision, dated July 8, 1966, sought [sic] the advice and counsel of others as to the claims presented in the letters of Allison & Haney, Inc., dated March 8, 1966.

8. You are requested to admit that some of the advice and counsel received by the contracting officer in response to his inquiries outlined in Request No. 7 above:

A. Was to the effect that the contract provisions regarding payment for concrete and cement used in encasements were ambiguous.

B. Was to the effect that the contract provisions regarding the location of encasements, paragraph 85(k) and drawings 144 to 147 were ambiguous.

Motion For the Production of Documents

The underlined portion of 3:

3. All written material concerning inquiries, comments, or suggestions submitted to the Government prior to the acceptance of bids relative to the plans and specifications on this project including copies of any memoranda or document of any type which may have been prepared as a result of said inquiries, comments or suggestions; and copies of and answers given to the party making the inquiries, comments or suggestions; *and inter-office memoranda listing information or advice about the inquiry, comment or suggestion; and any and all written documents relating thereto.*

4. All written reports or documents relative to the checking of the bids of Allison & Haney, Inc., on this contract including any inter-office memoranda relating to the presence or absence of errors in the bid and all other written documents relating thereto.

5. All correspondence or written documents of any nature whatsoever, including inter-office memoranda or other writings relating to the contracting officer's findings of fact and decision dated July 8, 1966, and any written documents relating thereto, whether made before or after July 8, 1966.

Interrogatories

30. Please state if any of the paragraphs of the specifications or drawings of the plans listed in Interrogatory No. 5 [52, 81, 85(K), 171(C), 189, and the paragraphs listed in answer to Interrogatory No. 3], including those paragraphs

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of the specifications or drawings listed in answer to Interrogatory No. 3 are 'stock' specifications or drawings.

31. If your answer to the above interrogatory is "Yes," please state:

A. Which of the paragraphs of the specifications or drawings in the plans referred to in Interrogatory No. 3 [the specifications and plans which the Government considers relative to the appeal] are "stock" specifications or drawings.

B. As to each of the paragraphs of the specifications or drawings listed in answer to part A hereof, state the last five construction projects of the United States of America on which each such paragraph or drawing was used.

32. Please state if any of the paragraphs of the specifications or drawings of the plans listed in Interrogatory No. 5 [52, 81, 85(K), 171(C), 189, and the paragraphs listed in answer to Interrogatory No. 3] were used on other construction projects designed or administered by the Bureau of Reclamation or any other agency of the United States of America, and identify such paragraph and drawing used.

33. If your answer to the above interrogatory is "Yes," please state as to each specification or drawing so used:

A. All projects within the last five years on which the drawing or specification was used.

B. The name of the contracting firm that performed the contract for the United States.

C. The location of the office where the contract was administered.

D. The name of the employee of the United States of America in charge of the office named in answer to part C hereof.

34. A. Please state if any of the paragraphs of the specifications or drawings referred to in Interrogatory No. 3 [the specifications and plans which the Government considers relative to the appeal] have been revised since the award of this contract.

B. If your answer to part A hereof is "Yes," please state:

i. Which were the specifications or drawings that were revised.

ii. As to each specification or drawing revised, please state the exact language in the revision.

iii. As to each specification or drawing revised, please state the names, present residence addresses, present business addresses, positions of employment of the persons authorizing and making the revisions.

iv. As to each specification or drawing revised, please state the reasons for this revision.

35. Please state in detail the reasons for issuance of Supplemental Notice No. 2, including:

* * * * *

B. The method or manner in which the need for each of the changes contained in the Notice was brought to the attention of the persons named in answer to part A hereof [who instigated issuance of the Notice].

C. The specific deficiency in the plans or specifications sought to be corrected by each of the changes contained in Supplemental Notice No. 2.

D. Singularly, and in detail, the substance of any memorandum or written document including inter-office material concerning this Notice, whether made before or subsequent to the issuance of said Notice, or, in lieu thereof, attach a copy of said written document to the answers to these interrogatories.

37. Please state the names, residence address, and positions of employment of all persons whom the contracting officer consulted relative to, or upon whose advice the contracting officer relied in making his findings of fact and decision dated July 18, 1966.

38. Please state as to each person named in answer to the above interrogatory:

A. The reason each was contacted by the contracting officer, or the reason each gave advice to the contracting officer.

B. Whether the contract [sic] between such persons and the contracting officer was oral or in writing.

C. If the contract [sic] was oral, please state in detail, the substance of all oral conversations between each party and the contracting officer including, and stating in detail, the opinion or advice given by each party to the contracting officer; if the contract [sic] was in writing, please state the substance of all written communication between each party and the contracting officer including, and stating in detail, the opinion or advice given by each party to the contracting officer or, in lieu thereof, please attach a copy of all written correspondence or documents between such persons and the contracting officer to the answers to these interrogatories.

The Government bases its objection to items "7" and "8" of the Request For Admissions; items "3" (last three lines), "4" and "5" of the Motion For the Production of Documents; and items "35, B, C, and D," "37" and "38" of the Interrogatories upon a claim of governmental privilege. In support of its position, the Government relies on our decision in *Vitro Corporation of America*,⁵ in which we denied without prejudice an appellant's motion for the production of documents.

In *Vitro* we held that whether particular documents are privileged against disclosure is a question that calls for the evaluation of such factors as "(1) the relevancy of the documents to the subject matter involved in the pending appeal; (2) the necessity of the documents for the proving of the appellant's case; (3) the seriousness of the danger to the public interests which disclosure of the documents would involve; (4) the presence in the documents of factual data, on the one hand, or of policy opinions, on the other; (5) the existence of confidential relationships which disclosure of the documents might unduly impair; and (6) the normal desirability of full disclosure of all facts in the possession of either party to the appeal."⁶ Since we

⁵ ICBA-376 (August 6, 1964), 71 I.D. 301, 1964 BCA par. 4360.

⁶ *Id.* at 310, 1964 BCA at 21,072.

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had no "reasonably specific information as to the contents and significance of the documents" the Government claimed were privileged, we remanded the matter to Department Counsel for production of documents in accordance with the guidelines contained in our opinion. In the event of further controversy we granted appellant the right to renew its motion.⁷

The appellant maintains that under the factors outlined in *Vitro* the Government may not deny it access to the items sought. It argues that "the contractor is entitled to know what evidence was presented to and considered by the contracting officer" and "all information he considered relevant and solicited to determine the facts and make his ultimate decision."⁸

Standing alone, item "7" of the Request For Admissions is not objectionable. As the Government recognized in its response, dated May 26, 1967, to appellant's application, a contracting officer may obtain information and advice from others.⁹ A request for an admission to that effect is therefore not inappropriate and is allowed. Item "8" of the Request For Admissions, items "3" (last three lines), "4" and "5" of appellant's Motion For the Production of Documents, and Interrogatories "35, B, C, and D," "37" and "38," all fall within the area of the administrative decision-making process which is protected from disclosure.¹⁰ As the United States Court of Appeals For the District of Columbia has said, "To the extent that the documents deal with recommendations as to policies which should be pursued * * *, or recommendations as to decisions which should be reached * * *, the claim of privilege is well founded."¹¹ However, the privilege is not absolute.¹²

The appellant is, of course, correct in asserting that it is entitled to know the basis for the contracting officer's decision. But it appears

⁷ In fact, it ultimately became necessary at the hearing on the *Vitro* appeal for the hearing officer to decide whether a number of withheld Government documents could be inspected by *Vitro's* counsel.

⁸ Letter to the Chairman of this Board, dated June 6, 1967, p. 2.

⁹ *Barringer & Botke*, IBCA-428-3-64 (April 19, 1965), 65-1 BCA par. 4797.

¹⁰ *Boeing Airplane Company v. Coggleshall*, 230 F. 2d 654, 660 (D.C. Cir. 1960) : *Kaiser Aluminum & Chemical Corp. v. United States*, 141 Ct. Cl. 38, 157 F. Supp. 939 (1958).

¹¹ *Boeing*, *supra* note 10. The amendment of section 3 of the Administrative Procedure Act, regulating availability to the public of Governmental records, which takes effect on July 4, 1967, does not appear to change the existing law in regard to intra-agency memoranda. See P.L. 89-487, 80 Stat. 250, subsection (e) (5).

¹² *Kaiser*, *supra*, note 10, at 49; 157 F. Supp. at 946; *Vitro Corporation of America*, *supra*, note 5.

that the appellant has overlooked the appeal file in this connection. The appeal file, according to our rule 4.6, "shall consist of the notice of appeal and the memorandum of arguments, if any, submitted therewith, *and of all documents on which the contracting officer has relied in making his findings of fact or decision, including the following:* (a) the findings of fact or decision; (b) the contract, specifications, pertinent plans, amendments, and change orders; and (c) *correspondence and other data material to the appeal.*" The appellant has not contended that the appeal file is inadequate or deficient in any regard, or otherwise alluded to it. Indeed, from the generality of the appellant's argument it appears that the appellant has given insufficient consideration to the material contained in the appeal file. The Board concludes, therefore, that upon the present showing the appellant's request for discovery as to the matters covered in Request For Admissions "8," items "3" (last three line), "4" and "5" of the Motion For the Production of Documents, and Interrogatories "35, B, C, and D," "37" and "38" should be denied.¹³

The Government objects to Interrogatories "30" through "34" on the ground that "the requested information would require burdensome, oppressive and detailed checking of numerous contracts and a large volume of other material." Instead, it invites the appellant to visit the contracting officer's office and obtain itself the answers to these questions.

At the same time, the Government does "not concede that evidence as to what other Bureau of Reclamation contract provisions may be is relevant to the issues here." It contends that the "question is one of the proper construction of *this contract* and not some other one or ones." The Government may be correct in this contention,¹⁴ but we are not required to pass on it at this time. For purposes of discovery it is not necessary that an interrogatory seek only material that is itself admissible as evidence.¹⁵ Rather, absent hardship, the scope of inquiry may encompass any material not privileged that is relevant to the subject matter of the proceeding and need not be limited to the precise issues involved.¹⁶

¹³ Compare *Merritt-Chapman & Scott Corporation*, VACAB No. 533 (August 5, 1966), 66-2 BCA par. 5762.

¹⁴ *Kahoe Supply Company*, GSBGA No. 1730 (January 25, 1967), 67-1 BCA par. 6123 (letters to other contractors held neither relevant nor material to resolution of issue in dispute). Cf. *American Ligurian Company, Inc.*, IBCA-492-4-65 (January 21, 1966), 73 I.D. 15, 66-1 BCA par. 5326.

¹⁵ 4 Moore, *Federal Practice*, par. 33.15, at 2326 (2d ed. 1966).

¹⁶ *Id.* at 2324, par. 26.25[3], at 1545.

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Interrogatory "30" and subdivision "A" of "31" relate to whether certain specifications are "stock" or standard specifications. This is a legitimate subject of inquiry. Moreover, to respond thereto will not, in our opinion, require "burdensome, oppressive and detailed checking." As to these items the Government's objections are overruled.

Interrogatories "31, B," "32" and "33" seek information regarding construction projects "of the United States of America" on which certain specifications and drawings were used. This question is too broad. To respond thereto would necessitate a survey of the entire executive branch of the United States Government. Neither this Board nor any bureau of this Department can compel the various other agencies of the Government to cooperate in such an undertaking.¹⁷ The scope of these interrogatories (as hereinafter reframed) is necessarily limited, therefore, to construction projects of the Bureau of Reclamation (the contracting agency here involved).

Interrogatory "34" relates to revisions of specifications and drawings made since the award of the contract in question. This is somewhat analogous to an interrogation into repairs and alterations subsequent to an accident, or into similar accidents. Although such evidence may not be admissible at the trial,¹⁸ and there is a split of authority on the propriety of such interrogatories,¹⁹ the "better view is that the discovery of such matters should be allowed."²⁰ We therefore overrule the Government's objection and hold that the proposed interrogatory is proper. But we stress that any material elicited will not necessarily be admitted into evidence at the hearing on this appeal.

The question that remains is whether the Government should be compelled to search and compile the data, if any exists, required to reply to Interrogatories "31, B" "32," "33" and "34," or whether the burden of so doing should fall upon the appellant. Of course, to some degree all interrogatories are burdensome.²¹ As we indicated at the outset, our concern is that hardship not result from the requirement to respond.

The Government contends that it "is not obliged to prepare appel-

¹⁷ *Winston Brothers Company, Foley Brothers, Inc., Frazier-Davis Construction Company, and Hurley Construction Company*, IBCA-625-2-67 (May 22, 1967).

¹⁸ 4 Moore, *op. cit. supra* note 15, par. 26.16[1], at 1185.

¹⁹ *Id.*, par. 33.15, at 2330.

²⁰ *Id.*, par. 26.16[1], at 1185.

²¹ *Id.*, par. 33.22, at 2379.

lant's case." Its point is well-taken.²² A party ordinarily will not be required to "make research and compilation of date not readily known to him."²³ This is precisely what the Government is being called upon to do. Moreover, the information here sought by interrogatory is more appropriate to the device of a motion for the production of documents, as the Government impliedly recognized when it voluntarily expressed its willingness to make available to the contractor at the contracting officer's office the various papers which might reveal the data sought by these questions. We therefore will not permit items "31, B" "32" "33" and "34" as interrogatories, but, instead, redesignate them as items "6" "7" "8" and "9" respectively, of appellant's Motions For the Production of Documents.

Conclusion

Items "1" through "6" of the Request For Admissions, not having been objected to, are allowed. Request "7" is granted. Request "8" is denied.

Items "1" "2" and "3" (except for the last three lines) of the Motion For the Production of Documents, not having been objected to, are allowed. Items "4" and "5" and the last three lines of "3" are denied.

Interrogatories "1" through "29" "35, A" "36" "39" and "40," not having been objected to, are allowed. Interrogatories "30" and "31, A" are hereby granted. Interrogatories "31, B" "32" "33" "34" "35, B, C, and D," "37" and "38" are denied. Interrogatories "31, B" "32" "33" and "34" are hereby redesignated as items "6," "7," "8" and "9," respectively, of appellant's Motion For the Production of Documents and, as limited in scope by our foregoing comments, are allowed.

The Government's responses to the Request For Admissions and Interrogatories shall be made not later than August 1, 1967. The Government shall make available the documents allowed for inspection and copying in the office where such documents are on file until July 15, 1967, or such later date as may be agreed to by the parties.

If, following inspection of documents as authorized in this decision, the appellant desires to have other documents produced which the Government deems privileged, the appellant may make application to the Board for production of such documents. In that event the appellant will be expected to identify the documents requested and to set forth the purpose for which disclosure thereof is sought. Upon a

²² "A litigant may not compel his adversary to go to work for him." *Aktiebolaget Vargos et al. v. Clark*, 8 F.R.D. 635, 636 (D.D.C. 1949).

²³ 4 Moore, *op. cit. supra* note 15, par. 33.20, at 2369.

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proper showing the Board will undertake to review such documents in accordance with the guidelines established in *Vitro, supra*, and determine their status.

WILLIAM F. MCGRAW, *Member*.

I CONCUR:

DEAN F. RATZMAN, *Chairman*.

WHETHER AUTHORITY TO RESTRICT OR CONDITION MINING ACTIVITIES IS SUPPLIED BY THE CLASSIFICATION AND MULTIPLE USE ACT OF SEPTEMBER 19, 1964 (78 Stat. 986; 43 U.S.C. SECS. 1411-18)

Classification of Multiple Use Act Lands—Mining Claims: Generally—Mining Claims: Special Acts—Multiple Use—Public Lands: Classification—Statutory Construction: Generally

The Classification and Multiple Use Act of September 19, 1964 (78 Stat. 986; 43 U.S.C. secs. 1411-18) authorizes, under certain circumstances, the segregation of public land from appropriation under the general mining laws, but it does not provide authority to restrict or condition the mining activities authorized by the general mining laws.

M-36699

June 19, 1967

January 25, 1967

TO: STATE DIRECTOR, UTAH, BUREAU OF LAND MANAGEMENT, SALT LAKE CITY, UTAH

SUBJECT: WHETHER AUTHORITY TO RESTRICT OR CONDITION MINING ACTIVITIES IS SUPPLIED BY THE CLASSIFICATION AND MULTIPLE USE ACT OF SEPTEMBER 19, 1964 (78 STAT. 986; 43 U.S.C. SECS. 1411-18)

You have asked the questions: (1) whether the subject act (hereinafter called "the act") and the regulations promulgated thereunder give authority, in your classification of lands, to leave land open to mineral location and eventual patent, but to impose certain restrictions or conditions pertaining to mining activity on the land, if determined to be in the public interest to do so; and (2) whether in your land classifications pursuant to the act you can segregate lands from disposition under the mining laws, but permit mining activities with certain controlling restrictions imposed for protection of other land values.

An illustrative example of the questions is a situation where important scenic, recreational or wildlife values could be adversely affected by the existence of roads or diggings in certain areas and you would desire miners to notify the district manager having administrative jurisdiction of the area of proposed roads, diggings or other surface disturbance, a minimum of 30 days in advance thereof, and the district manager would either approve or disapprove the location of the surface disturbance and if he disapproves he would require appropriate changes in the location or manner thereof.

In my opinion both questions must be answered in the negative.

Section 1 of the act (43 U.S.C. sec. 1411) instructs the Secretary of the Interior, "Consistent with and supplemental to the Taylor Grazing Act of June 28, 1934, as amended, and pending the implementation of recommendations to be made by Public Land Law Review Commission" to

* * * develop and promulgate regulations containing criteria by which he will determine which of the public lands and other Federal lands, * * * shall be (a) [disposed of for certain reasons] * * * or (b) retained, at least during this period, in Federal ownership and managed for (1) domestic livestock grazing, (2) fish and wildlife development and utilization, (3) industrial development, (4) mineral productions, (5) occupancy, (6) outdoor recreation, (7) timber production, (8) watershed protection, (9) wilderness preservation, or (10) preservation of public values that would be lost if the land passed from Federal ownership. * * *

* * * * *
None of [such land] * * * shall be given a designation or classification unless such designation or classification is authorized by statute or defined in regulations promulgated by the Secretary of the Interior.

Thus the act authorizes the classification of lands either for certain disposal uses or for interim management under principles of multiple use. The regulations promulgated as authorized by the act are contained in 43 CFR, Part 2410, and also Parts 1720 and 2240.

Section 3 of the act (43 U.S.C. sec. 1413) states the policy for "multiple use" and "sustained yield" management and section 5 (43 U.S.C. sec. 1415) defines "public lands," "multiple use," and "sustained yield of the several products and services."

Section 6 of the act (43 U.S.C. sec. 1416) specifies that the act does not repeal any existing law "in whole or in part including, but not limited to, the mining and mineral leasing laws" and that the act is supplemental to laws governing the administration of the Federal lands covered by the act.

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Section 7 (43 U.S.C. sec. 1417) says substantially the same thing as section 6 except it spells it out in more precise detail and provides in part:

Nothing herein contained shall be construed as—

(a) Restricting prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of the lands to which this Act applies under law applicable thereto pending action inconsistent therewith under this Act.

That the act is intended to supplement existing laws and not to repeal, in whole or in part, any existing laws, including the mining laws, is also emphasized by the legislative history of the act, contained in U.S. Code Cong. & Admin. News—88th Cong., 2d Sess. 1964, pp. 3755-3760.

While the act clearly provides authority to segregate Federal land from appropriation under the mining laws,¹ as well as the other public land laws, I am inclined to the view that the actions contemplated by your two questions are not authorized by the act and that for such authorization to exist, a specific statute therefor would be required.² I do not think this conclusion is inconsistent with the fact that the act authorizes the classification of lands for retention in Federal ownership and management for "mineral production" (43 U.S.C. sec. 1411,

¹ 47 CFR 2410.1-4(b)(2) requires that "land shall not be closed to mining location unless the nonmineral use would be inconsistent with and of greater importance to the public interest than the continued search for a deposit of valuable minerals."

² An illustration of a statute authorizing, as to certain lands, the conditioning or restricting of mining activities is the act of April 23, 1932 (47 Stat. 136; 43 U.S.C. sec. 154):

"Where public lands of the United States have been withdrawn for public use for construction purposes under the Federal reclamation laws, and are known or believed to be valuable for minerals, and would, if not so withdrawn, be subject to location and patent under the general mining laws, the Secretary of the Interior, when in his opinion the rights of the United States will not be prejudiced thereby, may, in his discretion, open the lands to location, entry, and patent under the general mining laws, reserving such ways, rights, and easements over or to such lands as may be prescribed by him and as may be deemed necessary or appropriate, * * * and/or the said Secretary may require the execution of a contract by the intending locator or entryman as a condition precedent to the vesting of any rights in him * * *. * * * Notice of such reservation or of the necessity of executing such prescribed contract shall be filed in the Bureau of Land Management and in the appropriate local land office, and notations thereof shall be made upon the appropriate tract books, and any location or entry thereafter made upon or for such lands, and any patent therefor shall be subject to the terms of such contract and/or to such reserved ways, rights, or easements and such entry or patent shall contain a reference thereto."

supra, and see 43 CFR 2410.0-3(j) (2) (iv)), which term is defined by 43 CFR 1725.3-3(d) as follows:

Mineral production. Management of public lands for mineral production involves the protection, regulated use, and development of public lands in a manner to facilitate the extraction and processing of minerals, whether off-site or on-site, long term or short term.

"Mineral" as used in the regulations under the act is defined by 43 CFR 2410.0-5(h) as

any substance that (1) is recognized as mineral, according to its chemical composition, by the standard authorities on the subject, or (2) is classified as mineral product in trade or commerce, or (3) possesses economic value for use in trade, manufacture, the sciences, or in the mechanical or ornamental arts.

These definitions are so broad as to include non-locatable minerals (e.g., minerals leasable under the act of February 25, 1920 [41 Stat. 437; 30 U.S.C. sec. 181 et seq.] as amended, and minerals disposable under the Materials Act of July 31, 1947 [30 U.S.C. sec. 601 et seq.] as amended) as well as locatable minerals. But I think that as to lands open for any sort of "mineral production" the laws governing the production of the type of minerals involved govern. For locatable minerals the general mining laws govern except insofar as some specific statute applies to certain land (such as the act of April 23, 1932, mentioned in footnote "2" *supra*³).

It is appropriate to mention the act of July 23, 1955 (69 Stat. 367, 30 U.S.C. sec. 601 etc.) which gives the Government certain rights to manage the vegetative and other surface rights of mining claims located after the date of the act, and certain other mining claims. (See 43 CFR, Part 3510.) Of course the rights afforded the Government by this act are less than the rights contemplated by your two questions. Also, the said rights of the Government under the act of July 23, 1955 terminate on issuance of patent.

The conclusion I arrive at then, succinctly stated, is that the act authorizes, under certain circumstances, the segregation of public land from appropriation under the general mining laws, but except for this, the act does not provide authority to restrict or condition the mining activities authorized by the general mining laws, and the public lands remain open to mining in the manner authorized by the general

³ Some citations of other special mining laws applicable to specific areas are gathered in 43 CFR, Part 3630.

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mining laws except insofar as particular lands are affected by some other statute, withdrawal action, etc.

J. STUART McMASTER,
Regional Solicitor.

APPROVED: June 19, 1967

EDWARD WEINBERG,
Deputy Solicitor.

UNITED STATES

v.

NEW JERSEY ZINC COMPANY

A-30782

Decided June 21, 1967

Mining Claims: Discovery

To constitute a valid discovery on a mining claim there must be a discovery on the claim of a mineral deposit that would warrant a prudent man in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine in the reasonably near future; this means that there must be a reasonable prospect that the mine can be operated to yield a profit.

Mining Claims: Discovery

The requirement that a claimant must show that he can make a profit from the operation of a mine does not mean either that a profit must be proved as a certainty or that it must be established as a present fact. The evidence need only support the conclusion that a person of ordinary prudence would risk his labor and means with a reasonable expectation of developing a valuable mine.

Mining Claims: Discovery

If a mining claimant would establish that measures might be employed which would eliminate the necessity to pay freight to the nearest markets, he must produce sufficient evidence of the feasibility and effect of such measures, and must show that the prudent man would expend such additional labor and means as would be reasonably required for their implementation.

Mining Claims: Contests

Where the Government contests a mining claim, the burden of proof is on the claimant to establish the validity of his claim.

Mining Claims: Discovery

Where a mining claim is based upon the existence of a mineral deposit of low grade compared to other deposits which are being utilized to produce the same mineral, the technology proposed for extracting the mineral has been applied only on a small scale in a laboratory on higher grade ores than exist in the claim, and the costs of producing and marketing the mineral are indicated to be in excess of the returns for the mineral, the claimant has not sustained the burden of proof necessary to validate the mining claim.

Mining Claims: Patent

The Secretary of the Interior is not authorized to issue a patent to a mining claim until he is satisfied that the requirements of the law have been met.

APPEAL FROM A HEARING EXAMINER

The United States has appealed to the Director of the Bureau of Land Management from a decision dated July 23, 1963, of a hearing examiner holding valid 14 lode mining claims for which New Jersey Zinc Company had filed applications for mineral patent, Colorado 018074 and 021357.¹

The Secretary of the Interior, in the exercise of his supervisory authority, has assumed jurisdiction of the appeal, and final Departmental action on it will be taken. 43 CFR 1840.0-9(d); *Public Service Company of New Mexico*, 71 I.D. 427 (1964).

The mining claims designated as Iron Master Nos. 1 and 2, the Black Iron Nos. 1 through 7, and Magnetite Nos. 1 through 5 are situated 20 miles southwest of Gunnison, near Powderhorn in southern Gunnison County, Colorado, in Ts. 46 and 47 N., R. 2 W., N.M.P.M. They are located on what is known as the Cebolla Creek titaniferous iron deposits, a feature of mineral interest as early as the 1880's, which underlie an area of approximately 12 square miles. The deposit is an igneous intrusion consisting largely of pyroxenite, a rock type principally composed of pyroxene, a member of the augite family of minerals.²

An overburden of rhyolite from 50 to 275 feet thick lies over a large

¹ The decision also held invalid 13 placer mining claims located by the contestee covering substantially the same land. No appeal having been taken from it, that part of the decision has become final.

² Exhibit A, pp. 2, 7. This reference and others following are to the transcript of the hearing held before the hearing examiner and to the exhibits admitted in evidence. Exhibit A is a report of the Bureau of Mines, RI 5679, "Cebolla Creek Titaniferous Iron Deposits, Gunnison County, Colo." (1960).

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portion of the claims. The pyroxenite mass in the claims area contains numerous minerals only three of which—magnetite, ilmenite and perovskite—are of economic interest. These are disseminated in the pyroxenite (lower grade ore) and also occur irregularly in lenses, pods and veinlets (higher grade ore). The entire deposit is described as being similar to "marble cake" or "plum pudding." (Tr. 253-254.) The quantity of mineral bearing ore in the claims was estimated by the contestee to be several hundred million tons and may constitute one of the major known deposits of titanium in the western United States.

The New Jersey Zinc Company began exploration for titanium deposits in the Cebolla Creek area in 1941. It purchased some 255 acres of lands on the deposit in the years 1942-45 and located the Iron Masters Nos. 1 and 2 in 1942. Magnetite Nos. 1-5 and Black Iron Nos. 1-7 were located in 1953. The Magnetite and Black Iron claims are situated approximately one mile east of the Iron Masters claims. The fee lands and the claims form an irregular contiguous area roughly two miles long and $\frac{1}{8}$ to $\frac{3}{4}$ of a mile wide.

In 1956 and 1957 the Bureau of Mines investigated the deposit, examined surface outcrops and conducted drilling operations. None of the work was on the area covered by the claims. The Bureau estimated that the deposit contained 11.7 percent iron and 6.5 percent titania (titanium dioxide, TiO_2), and that its mass could exceed 100 million tons.

In 1957 and 1958 New Jersey Zinc Company filed applications for patent to the lode claims. The United States instituted contest proceedings wherein it charged the claims were invalid on the ground that a discovery of a valuable mineral had not been made within the limits of any of the claims, and that the land within the limits of the claims was nonmineral in character. The claimant answered, denying the allegations of the complaint and asserting that a valid discovery had been made within the limits of each claim.

A hearing was held from September 11 through 14, 1961, before a hearing examiner. At the conclusion of the hearing and after consideration of written briefs of counsel, he held that there had been a discovery of a valuable mineral deposit on each claim and that the claims were valid. The contest was dismissed.

The evidence, in addition to stipulations and admissions in the pleadings, consists of 599 pages of reporter's transcripts and 62 exhibits. The parties have filed briefs summarizing the facts and law and setting forth their respective contentions. We have given careful consideration to the entire record, to the findings of fact, conclusions of law and decision of the hearing examiner and to the arguments of counsel. We have concluded that the decision must be reversed, the patent applications rejected and the claims declared to be null and void.

The dispute in this case is centered on the meaning of the concept of discovery under the mining law and on the sufficiency of the evidence of discovery. The parties are agreed that no rights can be acquired against the United States until a discovery has been made of a valuable mineral deposit within the limits of a mining claim. Rev. Stat. §§ 2319-2320 (1875), 30 U.S.C. §§ 22-23 (1964). They also agree that *Castle v. Womble*, 19 L.D. 455, 457 (1894) correctly states that

* * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.³

The contestee charges that the Government is applying a rule that an applicant for a mining patent must show that he can dispose of the product of his claim under conditions which will establish a "present profitability" of the operation (Answer Brief of Appellee-Contestee, pp. 27-28). The Government denies this charge and contends that the character of the evidence in this case is such that a prudent man would not be justified in the further expenditure of labor and means, with a reasonable prospect of success.

The idea that hopes of profit would motivate a would-be miner is not novel. In 1888 the Supreme Court held that a "valuable mineral deposit" is one which must be capable of being secured with profit.⁴ Nor is the idea that the mineral be marketable a new one. The earliest interpretation of the phrase "valuable mineral deposit" was made by the Commissioner of the General Land Office in 1873, the year after the mining law was enacted. He said,

³ This is known as the "prudent man" rule. See also *Chrisman v. Miller*, 197 U.S. 313, 322 (1905); *Cameron v. United States*, 252 U.S. 450, 452, 459-460 (1920); *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336 (1963).

⁴ *United States v. Iron Silver Mining Co.*, 128 U.S. 673, 675-76, 684 (1888). Cf. *Chrisman v. Miller*, *supra*, at 322.

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The meaning of the word valuable need not be discussed. Anything that a person is willing to give money for, or that is useful or precious, or that has merchantable qualities, is valuable.⁵

In dealing with a claim involving small amounts of intrinsically valuable minerals, the Department has said,

It is true that some of the samples show the presence of gold on the claim, but where the value of the gold found is so slight in relation to the cost of extracting it that a person of ordinary prudence would not be justified in the further expenditure of labor and means, with a reasonable prospect of success in developing a valuable mine, there has not been a valid discovery within the meaning of the mining laws. *United States v. Eric North*, A-27936 (July 1, 1959); *United States v. Robert W. Carnes*, A-28178 (May 23, 1960); *United States v. Richard L. and Nellie V. Effenbeck*, A-29113 (January 15, 1963).⁶

In evaluating a deposit of low-grade manganese, the Department has required that ability to make a profit be shown, noting that "the isolation of the claim requires trucking of ore to a railroad terminal and shipping at costs which exceed the selling price of the ore." *Julius R. Guglielmetti*, A-27871 (May 13, 1959).

The courts have recently approved the requirement that, with respect to deposits of intrinsically valuable minerals, the evidence justify a reasonable expectation of profit. In *Adams v. United States*, 318 F. 2d 861 (9th Cir. 1963), Adams, whose gold claims had been held invalid by the Department, contended "that as long as the mineral involved has intrinsic value it is not necessary that it be mineable at a profit." In response the court noted that "* * * value, in the sense of proved ability to mine the deposit at a profit, need not be shown," but that it was proper for the Department, in applying the prudent man rule to gold claims, to consider evidence as to the cost of extraction, "not to ascertain whether assured profits were presently demonstrated; but whether, under the circumstances, a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed. The agency did not, in this regard, apply an improper standard." (P. 870)

Much earlier, in *Cole v. Ralph*, 252 U.S. 286, 299 (1920), the court stated that a claimant's testimony that "there was no mineral exposed to the best of my (his) knowledge which would stand the cost of

⁵ Copp, *United States Mineral Lands* 61 (1881).

⁶ *United States v. Robert G. and Orpha B. McMillan*, A-29456 (July 26, 1963).

mining, transportation and reduction at a commercial profit' * * * tended to discredit the asserted discoveries."

The requirement that a claimant with a low-grade deposit show that he can make a profit does not mean either that profit must be proved as a certainty or that it must be established as a present fact. The evidence need only support the conclusion that a person of ordinary prudence would risk his labor and means with a reasonable expectation of developing a valuable mine.

The contestee asserts that to allow the Government to prevail "would mean that for all practical purposes, this great ore deposit * * * would be locked in the ground forever." (Answer Brief of Contestee-Appellee, p. 101). On the contrary, the rule we apply here insures only the public lands of the United States are not placed in private hands to be no longer available for disposition or use for public purposes.

We conclude that the record must contain evidence of probable costs of extracting, processing, and transporting the mineral product for comparison with the price for which it can be sold. These facts need not be proved to a certainty but the evidence must be of such character taken with all the other evidence to satisfy the Secretary that a person of ordinary prudence would probably make a profit from his investment of labor and capital. As the Department pointed out long ago:

[T]he mineral deposit must be a "valuable" one; such a mineral deposit as can probably be worked profitably; for otherwise, there would be no inducement or incentive for the mineral claimant to remove the minerals from the ground and place the same in the market, the evident intent and purpose of the mining laws.⁷

The theoretical operation proposed by the contestee for the mining and treatment of the deposit can be outlined as follows:

1. The ore would be mined at the rate of 5,000 tons per day by the open-pit method without any attempt at selection (Exhibit A, p. 11).⁸ at a cost of 50 cents per ton, or \$2,500 per day.
2. The average grade of ore to be fed to the mill would be 10 percent titania and 15.1 percent iron.
3. The pit would embrace the patented lands as well as the claims.
4. A process, developed by contestee and researchers at Columbia University which combines magnetic and flotation separation, would produce two products, 1,001 tons per day of a magnetite concentrate

⁷ *Oatcrack Gold Mining Company et al.*, 43 L.D. 248, 254 (1914).

⁸ Cf. Tr. 442 where contestee's exploration manager Radabaugh said there would probably be some selection.

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containing 11.90 percent titania and 53.50 percent iron, and 413.5 tons per day of a perovskite concentrate containing 50.24 percent titania and 6.08 percent iron. The cost of this processing would be \$2 per ton or \$10,000 per day.

5. The magnetite concentrate would be fed to an electric smelter which would, by subjecting the concentrate to the "Strategic-Udy" process, produce two products, 523.3 tons per day of pig iron containing 98.75 percent iron and 0.15 percent titania and 262.0 tons per day of slag containing 41.56 percent titania and 7.13 percent iron.

6. The cost of the Strategic-Udy processing would be \$20 per ton or \$20,020 per day.

7. The 523 tons per day of pig iron would be shipped to a market, the nearest being in Pueblo, Colorado.

8. No statement was made as to what contestee would do with the perovskite concentrate and the slag. The Government witnesses assumed shipment and sale to the nearest markets. It was suggested by contestee's attorneys and witnesses that the company could possibly build a pigment plant on or near the property.

The Government produced testimony to the effect that, even if the contestee's allegations of the efficacy of its processes are accepted and even if the costs are assumed to be low and the sale prices to be high, the operation will lose money. At this point it was incumbent upon the contestee to come forward with evidence to support its allegations and to show that, if the allegations were true, a profitable mine would probably result.

The Government witness Mallery estimated the cost of the operation as follows:⁹

Mining 5,000 tons per day @ 50¢-----	\$2, 500
Milling 5,000 tons per day @ \$2-----	10, 000
Smelting 1,001 tons ¹⁰ per day @ \$20-----	20, 020
Overhead 5,000 tons per day @ 20¢-----	1, 000
Total-----	\$33, 520

⁹ Exhibit P.

¹⁰ Mr. Mallery assumed an average grade of feed to the mill of 8 percent titanium dioxide and 10 percent iron; he estimated 800 tons per day of magnetite concentrate. We have accepted the contestee's estimate of 1,001 tons for the purposes of this calculation.

Both parties agreed that the pig iron would be sold. The Government witness Mallery assumed that the iron would be sold at the nearest market in Pueblo, Colorado, for \$60 per ton. The nearest market for the perovskite concentrate and the slag was in East St. Louis, Illinois, and the Government witnesses testified that the price there would be \$20 per ton. Thus, the estimate of revenues from the operation per day were:¹¹

523.3 tons of pig iron @ \$60-----	\$31, 398
675.5 tons of titanium concentrate and slag @ \$20-----	13, 510
Total-----	<hr/> \$44, 908

All of these estimates were accepted by the contestees. Mr. Crabtree thought the estimate of mining costs was a little low and the estimates of milling costs a little low. He also thought the price for the pig iron was around \$50 per ton. But he "accepted" Mr. Mallery's estimates. (Tr. 510-511) The Government also calculated the cost of transporting the pig iron to Pueblo to be \$12 per ton and the cost of transporting the titanium concentrates to East St. Louis to be \$19 per ton. The Government contends that additional transportation costs of \$6,270 for the pig iron and of \$12,900 for the titanium concentrates would increase the costs to a total substantially in excess of the total revenue, and that the operation would lose money.

The contestee objected to the inclusion in the economic analysis of freight charges for the shipment of products to the nearest markets. If these items of expense are disregarded, the assumed facts would support the validity of the claims. (Exhibit 27, Tr. 510-513)¹²

To justify exclusion of freight charges for the pig iron, a witness for contestee testified that "pig iron is normally sold f.o.b. plant, not f.o.b. consuming point." (Tr. 512)

Two witnesses for the Government testified to the propriety of

¹¹ For the purposes of this calculation contestee's estimates of marketable tonnages are accepted.

¹² Exhibit 27 is a recalculation by contestee's witness Crabtree of Exhibit P which was prepared by Government witness Mallery. The only objection Mr. Crabtree had to Exhibit P (other than the inclusion of freight charges) was that Mr. Mallery started with a mill feed of ore assaying 8 percent titania and 12 percent iron. If computed to reflect Mr. Crabtree's assumption of a higher quality feed, the operation would still lose \$7,782 per day.

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charging the freight to the contestee. (Exhibits E and P) To suggest that "normally" pig iron is sold f.o.b. plant does not contradict their testimony without a showing that this case is normal. The inference drawn by contestee is that a purchaser of pig iron will pay a quoted price plus freight. Thus the contestee would be put at a competitive disadvantage as to any supplier closer to the point of purchaser's consumption.

To justify exclusion of freight charges for the titanium concentrates it has already been noted the suggestion was made that they could be processed in a pigment plant which might be built on or near the property. However, no one testified that the company was considering such a suggestion and no officer or employee alluded to it. The record contains no substantial evidence of the cost of a pigment plant, the expense of its operation, the value of its products, the existence of markets or of any other facts relevant to the decision of a prudent man considering whether he should or should not build such a plant.¹³

Under these circumstances we cannot disregard freight costs in evaluating the economic potential of a mine on these claims. There is inadequate evidence in the record to justify the conclusion that a purchaser would pay \$60 per ton plus a freight charge of \$12 per ton for Cebolla Creek pig iron. There is no evidence in the record from which the Secretary of the Interior can determine whether a prudent man would build a pigment plant near the claims or in Colorado.

The contestee failed, therefore, to rebut the Government's prima facie case which merely assumed that the allegations made by contestee

¹³ The following is all there is to be found in the record about a pigment plant: One of contestee's attorneys questioned a Government witness on the effect of building a local plant on the witness' inclusion of freight costs in his economic analysis. (Tr. 348) Another attorney for contestee, arguing against the inclusion of freight to East St. Louis (the nearest market) in determinations of overall cost, said "Wouldn't it be just as reasonable * * * to say that a large company would build their plant here in Colorado?" (Tr. 361) One of contestee's witnesses said, "* * * this operation would contemplate construction of a pigment plant in the area and would treat the two titanium bearing concentrates locally." (Tr. 512) The same witness said he had done no economic analysis for a pigment plant (Tr. 528), and that such a plant "would have to stand on its own feet." (Tr. 529) Finally, another witness for contestee said that the company knew "* * * that sometime in the not distant future there will be justification for building a pigment plant in this area." (Tr. 574) There is no other evidence of the existence of such knowledge and no evidence of the basis therefor.

were true. It also failed to produce evidence sufficient to establish the truth of its allegations.

Mr. Radabaugh, who had been in charge of the company's Cebolla Creek exploration work testified that the average grade of ore within the contestee's holdings, including the claims, was 10.0 percent titania and 15.1 percent iron. (Tr. 408) He had arrived at his estimate by combining the assay of a composite of all drill cores drilled during 1942-43 on lands owned by contestee and the weighted average of 11 drill cores taken from the claims in 1959-60. (Tr. 407-408)

Mr. Radabaugh's "composite" was probably a deliberately selected high-grade sample. He designates it as "higher grade" (Tr. 407-408) and it is much higher in value than the average of cores of drilled holes (Ex. A, p. 2, Tables 3-6). He does not explain how the composite was made. At least two other "composites" were made from the same 1942-43 drill cores and all were different. (Exhibits 21 and 22) On the other hand, the weighted average of the 11 drill cores purports to be an accurate assay. Thus, the second component of Mr. Radabaugh's average also includes high-grade material, by which its value is increased. The method used by Mr. Radabaugh to combine these components was to assume that the higher grade composite represented 10 percent of the entire deposit and the weighted average of the 11 cores represented 90 percent. (Ibid.) It was claimed by contestee that the "lenses, pods and veinlets" comprised 10 percent of the entire deposit and the pyroxenite ore comprised 90 percent. There was no showing that the average of the "lenses, pods and veinlets" was as rich as Mr. Radabaugh's high-grade sample and the disseminated pyroxenite ore was lower than the overall average of the 11 cores.¹⁴ Thus it appears that Mr. Radabaugh arrived at his estimate by a method which necessarily exaggerated its value.

But even if Mr. Radabaugh's estimate correctly evaluated the evidence from the cores, it does not follow that the entire deposit within the claims and the patented land can be said to have the values he

¹⁴ Mr. Radabaugh agreed that the disseminated ores "would be about 6 percent TiO_2 and about 7 percent iron." (Tr. 431)

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asserts. Most of the 1959-1960 holes were scattered and at a distance of about a mile to about two miles from the 1942-1943 holes which were clustered at the west end of the property. No samples were produced for the intervening area. Some of the property is within an area of a carbonatite intrusion in the pyroxenite. The carbonatite is not ore. (Ex. B, Tr. 403) The evidence is clear that the deposit is not consistent in value from place to place.

In this state of the record it is almost impossible to say with any assurance what average grade or average range of grade might be found beneath the claims. Indeed, Mr. Radabaugh conceded that the property is not now ready for mining but that it needs further exploration. (Tr. 440) ¹⁵

It was assumed that an open pit mine would be developed on the property. Yet there was no evidence of the practical problems of such an operation.

Some of these problems are obvious. The shape of the parcel proposed to be mined, long and narrow, is not best suited to an open pit operation since depths attainable are dependent on an ability to spread out as the pit deepens. The depth attainable is also dependent on the overall safe slope possible. This is determined by the character of the material being mined. Calculations of the amount of ore beneath the claims (Tr. 404-405) is meaningless if a large part cannot be removed. There is no evidence from which a judgment can be made on these matters.

One gets the impression that the open pit method is selected because it is cheapest and since this is a marginal operation ¹⁶ costs must be kept at a minimum.¹⁷

¹⁵ There is reason to believe that the 1959-1960 drill holes themselves were not sufficient for exploration purposes. Their primary purpose was "to establish discovery, to establish the presence of this material underneath the volcanic capping." (Tr. 443) Their average penetration of the ore was 65 feet. In contrast, the 1942-1943 holes penetrated the pyroxenite for hundreds of feet, in one case over a thousand feet. (Tr. 388-391)

¹⁶ The hearing examiner found that the assays of samples taken by the contestee show an average of 14.1 percent iron and 9.6 percent titania while two other working properties, McIntire in New York averages 22-23 percent iron and 18 percent titania and Allard Lake in Canada, 40-45 percent iron and 35 percent titania. Mr. Montgomery testified, speaking of the Cebolla Creek deposit, "There is no commercial project containing similar minerals that is working, to my knowledge. There is no deposit that is as low a grade that is working, to my knowledge." (Tr. 53)

¹⁷ Tr. 297 (Mallery), 403 (Radabaugh).

The cost of mining was estimated by Mr. Mallery at 50 cents per ton. (Exhibit P) This was accepted by Mr. Crabtree for the contestee, although he thought it might be somewhat low. (Tr. 510) Mr. Mallery's estimate was "perhaps conservative" and "based upon costs of open pit mining which I am familiar with." (Tr. 308) Mr. Montgomery estimated a mining cost of \$1 per ton based on the experience of Minnesota, North Dakota and Arizona mines. (Tr. 49) It is at least doubtful that the mining cost would be as low as 50 cents a ton. Clearly Mr. Montgomery did not include the cost of removing the overburden. Apparently Mr. Mallery did not. The contestee had nothing to say on the subject. It merely accepted Mr. Mallery's estimate.

Contestee's allegation is that a combination magnetic-flotation process treating 5,000 tons of ore per day will produce 1,001 tons of magnetite concentrate and 413.5 tons of perovskite concentrate. The evidence of the efficacy of this process was given by contestee's witness M. L. Fuller.

Mr. Fuller was permitted to testify, over objection, to results of experiments made by a team at Columbia University School of Mines under the technical direction of Professor Taggart, now deceased.¹⁸ "My responsibility was to keep close contact with the work which I did by frequent visits, conferences, correspondence, telephone calls, and so forth," Mr. Fuller testified. (Tr. 468)

The sample tested was one of the composites from the 1942-43 drill cores. It contained 18.6 percent titania and 25.6 percent iron. (Tr. 469, Exhibit 24) No experiments were made of samples from the claims or of samples containing a mineral concentration similar to the assumed feed to the hypothetical mill. (Tr. 478) The experiments produced a magnetite concentrate containing 53.50 percent iron and a perovskite concentrate containing 50.24 percent titania. These have already been referred to in item 4 on page 8 and were a part of the flowsheet (Exhibit 26a) for the entire operation.

¹⁸ Hearsay testimony can be given little weight where no opportunity is made available for cross-examination on a vital issue. *United States v. Houston*, 86 I.D. 161, 166 (1959).

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Exhibit 26a, however, assumes a feed, not of the grade of the sample tested by Professor Taggart, but of the assumed average grade of the deposit, i.e., 10.0 percent titania and 15.1 percent iron. To assume that the lower grade feed would produce the same percentage concentrates, but only lesser amounts, is not justified.

The deposit consists of pyroxenite, in which the minerals are disseminated in lesser concentration, and lenses, pods or veinlets of higher value ore. The low-grade material composes 90 percent of the deposit, the lenses, pods or veinlets only 10 percent.¹⁹ The uncontradicted evidence of the Government was that the presence of augite inhibited high recoveries in the milling process. Mr. Batty testified that,

there was quite a difference in how the titanium was contained in what minerals it was contained. In composite 2, the chief mineral was perofskite and so in that product we made the highest recovery. (Tr. 212) * * * The more perofskite present, the higher grade products you get. For instance, in the augite, there is a maximum possibility of 9 percent titanium * * * while in the perofskite, I believe you can get, oh, perhaps 55 percent. (Tr. 213)

According to contestee's supplementary statement to its patent application (Exhibit 1, p. 7), "Perofskite and magnetite are present in about equal proportions and comprise 80 percent or more of the massive ore," i.e., the lenses, pods and veinlets. Hence, the material treated at Columbia would have much less augite than the feed to the mill.

Mr. Batty worked on the Cebolla Creek ores for the better part of a year and made extensive metallurgical studies. (Tr. 216-217) He gave his results on a flowsheet (Exhibit L) showing a range of recoveries, reflecting the results of many tests. He showed recoveries of 48 to 58 percent iron in the magnetite concentrate and 27 to 53 percent titania in the titanium concentrate. In contrast, Mr. Fuller showed the results for only one sample (Exhibit 24) although there had been hundreds

¹⁹ Tr. 408. This appears as contestee's Radabaugh's guess. The record does not reveal that any measured estimate was made.

of tests conducted in the Columbia University studies. (Tr. 480) All of his tests were made on the higher grade material. (Tr. 478) The lower grade constituent of the deposit is principally augite, the mineral which Mr. Batty testified resulted in lower recoveries. The record leaves a question very much in doubt as to whether the process described by Mr. Fuller could produce the results claimed for it on Exhibits 24 and 26a when the assumed average grade ore is fed to an actual mill.

Exhibit 26a was presented by Mr. Crabtree of the Colorado School of Mines Research Foundation, Inc. It is a flowsheet showing the treatment of 5,000 tons per day of ore of assumed average grade (10.0 percent titania and 15.1 percent iron). It carries the ore through the mill, using the figures provided by Mr. Fuller's Exhibit 24. It then puts the magnetite concentrate through the Strategic-Udy process.

There is very little evidence in the record about the Strategic-Udy process. Apparently Mr. Crabtree had little or no experience with this process himself. He refers to a study in Europe by "one of our engineers" and to the fact that a plant in Sorel, Quebec, Canada, uses a similar process. (Tr. 507; 509) Any one of several other processes might be used but Mr. Crabtree had not made any economic analysis to see what process would be best. (Tr. 507, 521) He estimated the electricity requirement of nearly 308 million kilowatt hours per year on the basis of a pilot plant at Niagara Falls which had been visited by engineers from the Foundation. He agreed that the presence of silicates would increase the electricity and coal requirements. (Tr. 522) Augite, the principal mineral in the low grade ores, is a silicate. (Tr. 202)

No basis whatsoever is given for Mr. Crabtree's opinion as to the quantity or quality of concentrates from such a plant as shown on Exhibit 26a. If any work was done at all at the Foundation, it appears to have been done by others. Mr. Crabtree acknowledged that his engineers had not tested ores from the Cebolla Creek deposit or any similar ores for Strategic-Udy or for any other feature of the operation. (Tr. 520) Again the issue is in doubt as to whether the Strategic-

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Udy process can work at all, whether it can produce the results claimed but not proved or whether it can operate at the costs estimated.²⁰

The contestee castigates the Government witnesses for their creation of a "hypothetical" mining operation. It should be noted, however, that the mining operation was the hypothesis of contestee. It was contestee who hypothesized the grade of ore to be fed to the mill, the process there employed, and the product produced thereby. It was the contestee who proposed that the magnetite concentrate of hypothetical value be subjected to treatment in a hypothetical Strategic-Udy plant to produce two hypothetically valuable products. All the Government witnesses added was the estimate of cost of the various stages of the operation and the estimate of value of final products—estimates which the contestee agreed were fair.

Contestee seems to be under the impression that it is entitled to a patent unless the Government proves that it has no discovery. This is not the law.

The duty of the officers of the Government is to insure that the laws are properly executed. The Secretary of the Interior as the chief officer of the Government entrusted with the custody of the public lands is authorized to issue patents in proper cases. He " * * * is charged with seeing that this authority is rightly exercised to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." *Cameron v. United States*, 252 U.S. 450, 459-460 (1920).

In *United States v. Iron Silver Mining Co.*, 128 U.S. 673, 675-76 (1888), the court said,

* * * It is the policy of the government to favor the development of mines of gold and silver and other metals, and every facility is afforded for that purpose; but it exacts a faithful compliance with the conditions required. There must be a discovery of the mineral, and a sufficient exploration of the ground to show this fact beyond question.

²⁰ Mr. Montgomery estimated the cost at \$20 per ton assuming large amounts of electric power would be available at low cost. Exhibit E, p. 5.

The fact is that the Secretary of the Interior is not authorized to issue a patent until he is satisfied that the requirements of the statute have been met. Thus, whoever may be said, as a procedural matter, to have the burden of proof, whoever must call the first witness, whoever is entitled to open and close the argument, the record must contain evidence necessary to support the granting of the claimant's patent application. If the evidence does not affirmatively show entitlement to a patent, no patent can issue. The claimant has the risk of non-persuasion.

At the prehearing conference held March 15, 1961, the parties stipulated

That the proceedings with respect to burden of proof in the presentation of evidence by the parties shall be as set out in the *Foster v. Seaton* case, 271 F.2d 836.

In that case, in a contest brought by the Government, the hearing examiner had decided that the claims were valid. The Director of the Bureau of Land Management reversed and Foster's appeal to the Secretary was unsuccessful. *United States v. Foster et al.*, 65 I.D. 1 (1958). The claimant then resorted to the courts, contending, as one ground for overturning the Secretary's decision, that the Government had improperly placed the burden of proof on the contestee. It was argued that the Administrative Procedure Act, 60 Stat. 241, 5 U.S.C. sec. 1006, states that "the proponent of a rule or order shall have the burden of proof." The court said,

The short answer to appellants' objection is that they, and not the Government, are the true proponents of a rule or order; namely, a ruling that they have complied with the applicable mining laws * * *. Were the rule otherwise, anyone could enter upon the public domain and ultimately obtain title unless the Government undertook the affirmative burden of proving that no valuable deposit existed. We do not think that Congress intended to place this burden on the Secretary.²¹

The *Foster* case, *supra*, is authority for the proposition that the burden of proof in a contest by the Government of a mining claim

²¹ *Foster v. Seaton*, *supra*, at 838.

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is on the claimant. If the record does not contain sufficient evidence to persuade the Secretary or his authorized officers that the law has been complied with, the Department cannot legally grant the gratuity the claimant requests. *East Tintic Consolidated Mining Claim*, 40 L.D. 271 (1911).

A patent applicant must point out the precise place where his discovery was made (43 CFR § 3450.1(a)) and must keep his discovery points open for inspection. *Andrew A. Carothers*, A-14542 (August 27, 1930). These requirements have long been a part of the mining law. *Silver Jennie Lode*, 7 L.D. 6 (1888), Regulations, March 29, 1909, 37 L.D. 728, 766. These requirements are consistent only with the theory that the burden of proof is on an applicant to establish his entitlement to a patent. The absence of substantial evidence of discovery must result in invalidation of his claims.

In summary, contestee described a method of mining and treatment of the ores from these claims, the employment of which, it contended, would result in a paying mine. The Government's proof was that, even granting contestee's claims to be true, it was evident that the operation could not succeed. Contestee argued that the Government improperly included in its economic analysis the cost of shipment of concentrates to market. However, it produced no evidence that the freight charges could be disregarded.

This in itself is sufficient ground for denying contestee's applications for patents. Not only are the facts alleged by contestee insufficient to justify issuance of patents, but the facts alleged are, for the most part, unproved. The average grade of the ore was not proved to be as claimed, the success of the proposed milling process was not determined from actual experiments with the average grade of ore which would be available at Cebolla Creek, and the Strategic-Udy process was never tried on ores similar to those alleged to be in the claims.

The contestee had the burden of proof on these issues. It must suffer the consequences of its failure to bear that burden.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4) (a); 24 F.R. 1348), the decision of the hearing examiner is reversed, the patent applications are denied and the claims are declared to be null and void.

FRANK J. BARRY,
Solicitor.

JASE O. NORSWORTHY

NORTH AMERICAN COAL CORPORATION

JASE O. NORSWORTHY

A-30738

*Decided June 26, 1967***Coal Leases and Permits: Leases—Contracts: Formation and Validity: Bid and Award—Regulations: Waiver**

The failure of a high bidder at a sealed bid auction to submit with his bid a statement of his citizenship and interests in other holdings required by regulation and the invitation to bid may be waived where the default has given him no advantage over the other bidder.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

North American Coal Corporation has appealed to the Secretary of the Interior from a decision dated September 27, 1966, of the Acting Chief, Office of Appeals and Hearings, Bureau of Land Management, which reversed a decision of the Montana land office rejecting Jase O. Norsworthy's bid for competitive coal lease Montana 071813, dismissed North American's protest against Norsworthy's bid, and recognized Norsworthy's high bid as acceptable.

It appears that on October 29, 1965, North American Coal Corporation filed an application, Montana 071813' (N. Dak.), for a coal lease on 1,113.71 acres of land in T. 145 N., Rs. 87 and 88 W., 5th P.M., N.D. It being determined that that land and other contiguous land were subject to lease by competitive sale, 30 U.S.C. § 201 (1964), a sale was set for February 10, 1966. At the sale, which was by sealed bid, North American submitted a bid of \$3,559 and Norsworthy one of \$4,718.21. There were no other bidders. Norsworthy's bid was declared to be the high bid.

In a letter dated March 3, 1966, the land office informed North American that its bid was lower than Norsworthy's and that its deposit of $\frac{1}{5}$ of the amount of its bid would be returned to it in about three weeks. North American received the refund check, without further explanation, on March 28, 1966.

In addition, the land office, again on March 3, 1966, issued a decision rejecting Norsworthy's bid on the ground that he had not submitted with his bid a statement over his signature as to his citizenship and interest held in coal leases, permits, or applications as required by the pertinent regulation, 43 CFR 3132.4-3(a). This requirement was set out in a detailed statement concerning the lease sale which was posted in the land office and referred to in the published notice of sale.

On May 2, 1966, North American filed a protest against the refund of its bid deposit, saying that Norsworthy's bid having been rejected, its bid was next highest and should receive consideration.

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Norsworthy, in turn, appealed from the land office decision and filed with his appeal an acceptable statement of his citizenship and other coal holdings. The Office of Appeals and Hearings held that North American, having failed to appeal from the rejection of its bid, had lost any rights it might have had by virtue of its bid and that the rejection of its bid had become final. It then held that Norsworthy's filing of the required statement, though late, would be considered timely under a provision of a regulation, 43 CFR 1821.2-2(g), authorizing relief in the case of late filings, if certain conditions are met, at the discretion of the proper official.

In its appeal to the Secretary, North American contends that the regulation giving relief for a late filing cannot be applied to permit the bidder to cure a defect to the prejudice of the rights of another bidder, that, even if it were otherwise applicable, relief should not be granted where another bidder has made a proper bid, and that the land office letter to it of March 3, 1966, advising it of Norsworthy's high bid and that its bid deposit would be returned was not a final decision from which it must take an appeal in order to preserve its rights.

Since it is undisputed that Norsworthy failed to file the required statement with his bid, his bid did not satisfy the regulation, 43 CFR 3132.4-3(a). That regulation provides that "each bidder at a sale by sealed bid must submit with his bid, the following: * * * a statement over the bidder's own signature with respect to citizenship and interest held * * *."

The issues, then, are whether the defect can be waived under the provisions of 43 CFR 1821.2-2(g) or whether his bid could be accepted even in the absence of such a regulation or if it is not applicable.¹

Since we dispose of the case on other grounds, we need not consider the applicability of the regulation or the consequences of North American's failure to appeal from the land office letter of March 3, 1966.

The issue, then, is whether Norsworthy's high bid has earned him the right to a lease despite the fact that he did not comply with a mandatory requirement of regulation 43 CFR 3132.4-3(a).

The Department's usual rule, at least for noncompetitive dispositions of mineral leases or permits, is that an offeror who fails to comply with a mandatory requirement of a regulation is not a qualified applicant

¹ The regulation provides:

"When the regulations of this chapter (except Parts 1840 and 1850) provide that a document must be filed or a payment made within a specified period of time, the filing of the document or the making of the payment after the expiration of that period will not prevent the authorized officer from considering the document as being timely filed or the payment as being timely made except where:

1. The law does not permit him to do so.
2. The rights of a third party or parties have intervened.
3. The authorized officer determines that further consideration of the document or acceptance of the payment would unduly interfere with the orderly conduct of business.

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and is not entitled to priority until the defect is cured. *Ruby Company*, 72 I.D. 189 (1965); *Virgil V. Peterson*, A-30685 (March 30, 1967).

In a recent case the rule was assumed to be applicable to competitive leasing, although the Department concluded that the particular requirement a bidder failed to satisfy did not apply to the sale under consideration. *William J. Coleman*, A-30241 (May 7, 1965).

We doubt that this assumption is necessarily correct, for there is a substantial difference between noncompetitive and competitive leasing. When minerals are available for noncompetitive disposition, they must be awarded to the first qualified person who files a proper application. The Department has no way of distinguishing between offerors other than on the basis of the time in which they comply with its regulations. Since the lease or permit, its conditions, terms, rentals, are all the same no matter who the lessee is, the Department properly insists upon strict compliance with its requirements so that the administration of noncompetitive dispositions will be as uncomplicated and fair as possible.

Where competitive bidding is permitted, however, price replaces time as the primary criterion for determining who will be awarded a lease or permit. Competitive bidding is based upon the underlying assumption that all bidders have an equal opportunity to compete upon a common basis with other bidders.

North American argues that the integrity of the bidding system would be compromised if the Department permitted a late filing of a required statement. It points out that a bidder could withhold his deposit until he determined whether he wanted to complete his bid and then, after an opportunity to reevaluate the desirability of a lease, file or not file the deposit as he sees where his interest lies.

This argument assumes that all requirements are equally important so that none can be neglected lest some bidder gain an unfair advantage. We agree that if a bidder could withhold his bid deposit without penalty he would be in a much better position than other bidders. However, since the consequences of permitting deviations in so important an aspect of competitive bidding as the bid deposit would be so destructive to the orderly conduct of lease sales, such a lapse would not be excused. See *Malcolm N. McKinnon*, A-29979, A-29996, (June 12, 1964).

A statement relating to citizenship and other holdings, however, is on a different footing. We must assume that the bidder is qualified or else there would be no reason for him to participate in the sale. If he is qualified, there does not seem to be any advantage accruing to him from failing to file the required statements.

The only penalty provided by the regulations for failure of a high

bidder who has been awarded a lease to complete the steps necessary to its issuance, such as payment of the first year's rental, submission of a bond, signing the lease, is forfeiture of the bid deposit. 43 CFR 3132.4-3(b). Thus, every high bidder has an opportunity for a second guess if he is willing to part with his deposit, and one who has omitted to submit a statement required with his bid deposit has no option not open to any other high bidder.

The Comptroller General has recognized that failure to comply with a mandatory requirement of a bid invitation, even though prescribed by regulation, does not always necessitate rejection of the bid.

In a recent decision he restated the considerations pertinent to determining when deviations from the provisions of an advertisement for bids may be allowed:

Whether certain provisions of an invitation for bids are to be considered mandatory or discretionary depends upon the materiality of such provisions and whether they were inserted for the protection of the interests of the Government or for the protection of the rights of bidders. Under an advertised procurement all qualified bidders must be given an equal opportunity to submit bids which are based upon the same specifications, and to have such bids evaluated on the same basis. To the extent that waiver of the provisions of an invitation for bids might result in failure of one or more bidders to attain the equal opportunity to compete on a common basis with other bidders, such provision must be considered mandatory. However, the concept of formally advertised procurement, insofar as it relates to the submission and evaluation of bids, goes no further than to guarantee equal opportunity to compete and equal treatment in the evaluation of bids. It does not confer upon bidders any right to insist upon the enforcement of provisions in an invitation, the waiver of which would not result in an unfair competitive advantage to other bidders by permitting a method of contract performance different from that contemplated by the invitation or by permitting the bid price to be evaluated upon a basis not common to all bids. Such provisions must therefore be construed to be solely for the protection of the interests of the Government and their enforcement or waiver can have no effect upon the rights of bidders to which the rules and principles applicable to formal advertising are directed. To this end, the decisions of this Office have consistently held that where deviations from, or failures to comply with, the provisions of an invitation do not affect the bid price upon which a contract would be based or the quantity or quality of the work required of the bidder in the event he is awarded a contract, a failure to enforce such provision will not infringe upon the rights of other bidders and the failure of a bidder to comply with the provision may be considered as a minor deviation which can be waived and the bid considered responsive. 45 Comp. Gen. 221, 223 (1965), quoting 40 Comp. Gen. 321, 324 (1960).

In another case in which it was held that the failure of a bidder to submit photographs with his bid, as required by the bid invitation, made the bid unresponsive and required its rejection, the Comptroller General said:

In 36 Comp. Gen. 376 we recognized the right of the contracting agencies to require that bids be accompanied by certain kinds of information, which would include photographs. We stated in the cited case, at page 378, that where in-

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formation is deemed essential the invitation should contain an affirmative statement to the effect that failure to conform will result in rejection of the bid. The concept has been expanded to the point that where designated information is by the terms of the invitation required to be submitted with the bid the inference arises that the information is regarded as material and failure to conform requires the rejection of the bid. 39 Comp. Gen. 247, 249. That rule, however, applies only where the information goes to the responsiveness of the bid. Where the information is intended to be used in determining the bidders' responsibility, it may be changed subsequent to the bid opening without prejudice to consideration of the bid even where the invitation warns that failure to conform may result in rejection of the bid. 39 Comp. Gen. 655; *id.* 881 (1960) 43 Comp. Gen. 707, 709 (1964).

In the case last cited it was held that a failure to submit with a bid a list of business affiliates, if any, could be waived, although the procurement regulations stated that any bid which failed to include the statement would be rejected. 39 Comp. Gen. 881 (1960).

In still another case, it was held that a drawing procedure to determine a winner among two low tie bidders would not be upset although it was held without the bidders being present contrary to a Federal Procurement regulation since the purpose of the regulation, the avoidance of any suggestion of impropriety, had been satisfied, as well as the objective of the competitive bidding statute, which is fairness and impartiality in selecting the lowest bidder. 44 Comp. Gen. 661 (1965).

Again in B-158290 (January 17, 1966), a bidder's failure to furnish a "Bidder's Qualification Statement" was waived on the grounds that it dealt with the competency and ability to the bidder to perform (his responsibility) and that informational material relative to the responsibility of a bidder may be furnished after a bid opening where to do so does not affect the substance of the bid or is not otherwise prejudicial to the bidders.

The principles set out in this case, we believe, are pertinent to the disposition of this appeal.

The statement Norsworthy failed to file dealt solely with his qualification to hold a lease. His neglect in filing it with his bid neither gave him an advantage nor worked to the detriment of any other bidder. In the words of the Comptroller General, the statement was "solely for the protection of the interests of the Government * * * [and] can be waived and the bid considered responsive." 40 Comp. Gen. 321, 324, *supra*.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision of the Bureau of Land Management is, for the reasons given, affirmed.

FRANK J. BARRY,
Solicitor.

BOBBY CARLTON**A-30754***Decided July 24, 1967***Color or Claim of Title: Generally—Color or Claim of Title: Cultivation—
Color or Claim of Title: Improvements**

The improvement or cultivation of lands other than those belonging to the United States is not sufficient to meet the cultivation or improvement requirements as to Government lands for which application is made as a class 1 claim under the Color of Title Act.

**Color or Claim of Title: Generally—Color or Claim of Title: Cultivation—
Color or Claim of Title: Improvements**

Where the requirements for a class 1 color of title claim have been met as to a tract of land and the United States, on the mistaken assumption that the tract is privately owned, takes and floods a portion of the tract which contains all the required improvements or cultivation, the class 1 claim is not lost as to the remaining portion of the land which is neither improved nor cultivated.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Bobby Carlton has appealed to the Secretary of the Interior from a decision by the Acting Chief, Office of Appeals and Hearings, Bureau of Land Management, dated October 11, 1966, affirming a decision by the Bureau's New Orleans office, dated June 24, 1966, rejecting his application to purchase a 7.12-acre tract described as the E $\frac{1}{4}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ of the S $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 6, T. 11 N., R. 10 W., 5th P.M., Cleburne County, Arkansas, pursuant to the Color of Title Act of December 22, 1928, as amended, 43 U.S.C. §§ 1068, 1068a (1964).

Carlton's application was filed as a class 1 claim, defined in 43 CFR 2214.1-1(b) as one held:

* * * in good faith and in peaceful adverse possession by a claimant, his ancestors or grantors, under claim or color of title for more than 20 years, on which valuable improvements have been placed, or on which some part of the land has been reduced to cultivation. * * *

The application was rejected on the ground that the applicant had therein stated that there are no structural or cultural improvements of value upon the land, and that the land has not been cultivated.

In his appeal to the director, appellant explained that he did not understand the meaning of the statements asked in the application and was under the impression that the questions applied to each individual acre. He asserted that the land applied for had been a part of a farm unit upon which houses, barns, fences and sheds had been constructed and maintained and that the "lands in question" had been plowed, cultivated, pastured and improved and agricultural crops harvested therefrom and that woodlands had been harvested for marketable timber and for fuel for home use. He filed three affidavits to support

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these assertions. These affidavits indicated that the farm unit comprised 216 acres. The appellant asserted that in his application he said that this particular small portion of the farm had not had buildings on each acre, and he stated that with proper assistance from better informed persons he could have submitted all of this information when he submitted his original application. He submitted two deeds from which he traces his title to the land. These include lands described as the S $\frac{1}{2}$ NW $\frac{1}{4}$ of section 6, which would include the land covered by his application.

In affirming the rejection of the application, the Acting Chief, Office of Appeals and Hearings, stated that although the land had been part of a larger farm unit, there was no evidence showing that there were any valuable improvements on the land sought or that any portion thereof had been cultivated at the time he filed his application. He concluded that an application must be denied where the applicant fails to show to the satisfaction of the Secretary of the Interior that valuable improvements have been placed on the land applied for, or that any part thereof has been cultivated, and that such improvements were in place at the time of application, as required by the act, citing *Lillian Zellmer Sharlein, County of Langlade, Wisconsin*, A-28198 (April 19, 1960); *Homer Wheeler Mannix*, 63 I.D. 249 (1956); *Lewis J. A. Bockholt, Jeanette B. Fischer*, A-27906 (May 4, 1959). He pointed out that record information is to the effect that all of the cultivation and improvements were on the other portions of the farm unit referred to by the appellant at the time he filed his application and are, at the present time, covered by the waters of Greers Ferry Reservoir, constructed by the Corps of Engineers, United States Department of the Army, and that the 7.12 acres applied for are on a steep slope above the reservoir, which constitutes a poor site even for upland hardwood timber.

By Public Land Order 3845 dated October 5, 1965 (30 F.R. 12947), the fractional SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 6, described as containing approximately 16 acres, was withdrawn from all forms of appropriation under the public land laws and reserved under jurisdiction of the Corps of Engineers for the Greers Ferry Reservoir, subject to valid existing rights. This withdrawal would not preclude the perfecting of a claim under the Color of Title Act if a valid claim was created before the withdrawal. *Clement Vincent Tillion, Jr.*, A-29277 (April 12, 1963). Since the amendment of the Color of Title Act by the act of July 28, 1953, 67 Stat. 227, the Secretary no longer has discretion to refuse to issue patent to a person who satisfactorily shows that he is entitled to a class 1 claim. See *Lillian Zellmer Sharlein, etc., supra*. The question here is whether it has been shown that the requirements of the act

as to improvement or cultivation of the tract have been fulfilled, requiring this Department to issue a patent to the applicant.

The appellant's statement in his application supported the conclusion of the Bureau that there were no improvements or cultivation of the tract. He has since attempted to clarify the remarks in his application. He has stated that the tract was a part of an entire farm unit of 216 acres used by his family for 50 years, that this unit did have construction and improvements on it and was cultivated, timber was harvested, and the land was grazed and enclosed by a fence, with farm roads used by the owner through the land. He contends that under the Color of Title Act it is not necessary that each acre has been cultivated or improved because in areas such as that involved here, where the lands are rough and mountainous, it would be impossible to do so and to obtain the benefits of the law.

The Color of Title Act does not specifically state to what extent improvement or cultivation must be done upon a tract. It requires only that the tract be one "upon which valuable improvements have been placed, or on which some part of the land has been reduced to cultivation." It is apparent from the act that the improvement or cultivation must be upon the tract of land which is held adversely to the United States and which is not owned by the claimant. Thus, where the Government land has been thought to be a part of a larger parcel of land owned by the claimant, improvement or cultivation of the land to which the claimant has complete title will not satisfy the requirement as to the land to which the United States holds title. Therefore, it is essential that there must be a showing of some cultivation or improvement of a tract which is owned by the Government, and not simply of other lands belonging to the applicant or someone else.

It appears that the 7.12-acre tract was a part of a larger tract consisting of 16 plus acres which was owned by the Government. Apparently 9 acres of that tract were purchased from the applicant by the Army Corps of Engineers, together with other lands owned by the applicant, on the assumption that the 16 acres were also owned by the appellant. He states through his attorney that the 7.12-acre tract was not purchased by the Government because it was not needed for the project, and that he did not know of any claim by the Government to the tract until after it purchased the other 9 acres. He has not clearly shown that there were improvements or cultivation upon the 9-acre tract which the Government presumably purchased from him, although title was in the Government. However, there is evidence that there were improvements on or cultivation of the 9-acre tract in a report designated "Tract Examination Sheet" in the record. This report, referring to the Frl. SE $\frac{1}{4}$ NW $\frac{1}{4}$ of section 6, containing 16 plus acres, states that a prelake photo mosaic in the Corps of Engineers Project Office at the dam site "shows a bottom land field of about 4 acres on

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this tract." It also states that the portion of land with improvements has been conveyed to the Corps of Engineers and is now flooded. Thus, if there was cultivation or improvements upon the 9 acres of land which was owned by the United States but claimed by the appellant, purchased from him by the Government and now flooded, the question arises as to what effect this should have upon his claim to the remaining, unsold tract of land. In other words, if the Government had title to the 16-acre tract and if the appellant could have satisfied the requirements of the Color of Title Act to that tract before selling a portion of it to the Corps of Engineers, should he now be precluded from acquiring a patent to the remaining land because that portion of the tract meeting the requirements has been relinquished and is now flooded?

We do not think that he should be precluded. Assuming that the appellant had a valid class 1 claim at the time when the 9 acres were acquired by the Corps of Engineers, we do not believe that he should be held to have lost his rights to the remaining 7.12 acres because all the improvements or cultivation were located within the 9 acres. The record does not show whether the appellant voluntarily sold the 9 acres to the Corps or whether the land was condemned. There is no reason to doubt, however, that the land would have been taken by the Government even without appellant's consent since it was to be flooded. We have then the narrow question whether a qualified class 1 claimant for a tract of land should lose his rights to a portion of the tract because the Government takes the remaining portion which contains the qualifying improvements or cultivation. We do not believe that he can be deprived of a statutory right in this manner.

Therefore, we believe that the legal conclusion reached in the decision below is incorrect, if the facts as to improvement or cultivation of a portion of the tract owned by the Government are as assumed in this decision. If, on the other hand, the tract of Government land was not improved or cultivated when it was flooded by the Government and the only improvement or cultivation was upon land to which the applicant had complete title, then his application would not meet the requirements of the Color of Title Act.

Accordingly, the case will be returned to the Bureau for further consideration of appellant's application, and allowance of the application if upon investigation or from further information from the applicant, the Bureau confirms that the factual assumption is correct that there was cultivation or improvement upon the 9-acre portion of the tract which was owned by the Government before flooding, and there is no other reason apparent for denying the application.

Therefore, pursuant to the authority delegated to the Solicitor by

the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is set aside, and the case is remanded to the Bureau for further action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

APPEAL OF HARRIS PAVING AND CONSTRUCTION COMPANY

IBCA-487-3-65

Decided July 31, 1967

Contracts: Construction and Operation: Changed Conditions—Contracts: Construction and Operation: Changes and Extras—Contracts: Formation and Validity: Implied and Constructive Contracts—Contracts: Disputes and Remedies: Equitable Adjustments

Under a contract for the construction of a road requiring the use of a soft type of rock known as oolite, to be obtained from adjacent borrow areas, and where no subsurface investigations had been conducted by the Government to determine the availability of oolite in sufficient quantities, the contractor was entitled to rely upon the representations in the contract with respect to the presence of sufficient oolite materials. Upon excavation of borrow pits designated by the Government when the contractor encountered much harder rock that was difficult to excavate and crush, and little if any oolite material, the condition so encountered was a changed condition of the first category within the meaning of Clause 4 of Standard Form 23A. The direction by the contracting officer that the hard rock be utilized for constructing the road was a constructive change and the contractor is entitled to an equitable adjustment upon either theory, whether a changed condition was encountered or a constructive change was made.

BOARD OF CONTRACT APPEALS

The contractor has timely appealed from the decision of the contracting officer dated March 2, 1965, denying his claim for additional compensation based on an alleged changed condition. A hearing was held on December 6, 7, and 8, 1965.

The contract at issue was awarded to the appellant (hereinafter referred to as Harris) by the National Park Service on January 24, 1964. The contract, which included Standard Form 23A (April 1961 Edition), called for the construction of a loop road of approximately 14.9 miles (where previously only a single road existed) leading to and from a fire observation tower situated within the Everglades National Park. This road is known as the Seven Mile Fire Tower Road. The contractor was also required to construct a number of parking areas and walks in the fire tower area and to rebuild the old road. Work on this project was scheduled to be completed within 180 days after receipt of notice to proceed. However, as a result of a series of change orders, this time period was extended by 131 days, changing the completion date from August 29, 1964 to January 8, 1965. Work was

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actually completed and accepted on January 9, 1965, the contractor being assessed 50 dollars in liquidated damages for the one day of delay. This assessment is not disputed.

The contractor's bid price of \$238,565.75 was increased by the Government to \$250,613.25 as a result of Change Order No. 1 requiring an additional amount of fill, to be paid for at the unit price bid for "unclassified excavation for oolite fill." This amount was received by the contractor in a series of progress payments, the last one being made on February 1, 1965, after the work had been completed and accepted. At this time a release of claim was executed by the contractor excepting therefrom a claim for additional compensation in the amount of \$75,250. In support of this claim the contractor submitted a letter stating that while the contract had called for the excavation of oolite rock, the material that he encountered in the designated borrow areas, and which he was instructed to excavate, was much harder than oolite and involved a considerable amount of unanticipated difficult work, and additional time and expense to excavate. The contracting officer denied this claim on the grounds that any changed condition that might have existed had been previously resolved by the parties, and that the contractor's request for adjustment was untimely.

In addition to its position that the notice of a changed condition was untimely, and prejudicial to its rights, the Government, in this appeal, argues that no representation was made as to the materials to be excavated,¹ and that, in fact, only a rather small amount of oolite was required under the terms of the contract specifications.²

Counsel for the contractor asserts that adequate notice of the changed condition was given to the contracting officer, and that the rock that was encountered in the excavation of the borrow areas differed so materially from what was represented and anticipated that he is entitled to an equitable adjustment of his contract price under the changed conditions clause.

Before proceeding to a discussion of the respective merits of these contentions, it would appear useful to summarize what occurred in the performance of this contract and the manner in which the dispute arose. Prior to submitting their bids, all prospective bidders were invited to meet at the project site for a briefing concerning the construction work to be required and for a visual inspection of the project area. The general locations of the road and borrow areas were pointed out. These locations however could not be precisely determined as the job of staking and laying them out was an item of work to be performed under the contract. From the description given at the hearing by Mr. Frank P. Webber, the president of the appellant, it appears

¹ Government's Post-Hearing Brief, p. 4.

² Note 1, *supra*, p. 5.

that at the time of this meeting the area was generally overgrown and swampy, the only clear area being the old existing road leading from the highway to the tower.³

After the contract was awarded to Harris, and before notice to proceed was given, a pre-construction meeting was held, with representatives of the Government and the contractor present. At this time the general work rules were discussed and the government emphasized its desire to protect the wildlife in the area and preserve the natural appearance of the surroundings. To achieve this result, it was required that the borrow areas be sloped and dressed when excavation was completed. It was also at this meeting that Mr. Scholer, general superintendent of Harris, discussed the manner in which he planned to excavate the required fill material. The plan he submitted called for excavation in deep narrow cuts, rather than shallow digging over the extensive surface of the borrow areas. It was explained that by using this method the cost to the Government would be reduced, and the contractor would obtain greater amount of useful material with a minimum of excavation. The anticipated savings were attributed to the terms of the contract, which provided that payment was to be made for the quantities of material excavated without measurement of the material actually placed.⁴

The whole subject of excavation of the borrow area was of prime concern to the contractor, as this item constituted the major part of the work and about 75 percent of the contract price. The method set forth by Mr. Scholer apparently met with the approval of the Government, for this was the manner in which the work was actually performed.

The contractor received notice to proceed on March 2, 1964, and work was begun soon thereafter, the first task being that of laying out and staking the borrow areas and the roadway. The record indicates that excavation began sometime around the middle or latter part of March, and that shortly thereafter the problems of excavation now in dispute were encountered. Mr. Bramson, the Harris field superintendent, testified at the hearing that the material immediately below the surface was extremely hard and could not be moved with equipment normally used for oolite excavation.⁵

On April 7, a meeting was held at the site with the Park engineers and Harris officials present. The subject of this meeting was the suitability of the material being excavated, it having been previously discovered that a large quantity of sand was present. The contractor was ordered to cease work in the excavation of these materials.⁶ Mr. Web-

³ Tr. 100-101.

⁴ Tr. 138-139.

⁵ Tr. 194.

⁶ Appeal File, Government's letter, April 8, 1964.

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ber, president of Harris, thereafter requested a meeting with the contracting officer, Mr. Joseph, in order to further discuss the problem of the materials in the borrow area. A meeting was subsequently held on April 20, at which time a number of decisions were reached in an attempt to alleviate this problem. These decisions were summarized in the contracting officer's letter of April 21.⁷ This letter directed the contractor to continue to excavate in the designated borrow areas and utilize the available material found below the marl and muck overburden and above the sand strata. He was also instructed that when suitable oolite rock was found it should be set aside and used for the upper layer of the road embankment. The use of sand was to be allowed in reasonable quantities to be determined in the field by the project supervisor. These requirements were all accepted by the contractor.⁸ Testimony given by Government witnesses at the hearing indicates that the question of the hardness of the materials was also discussed at this meeting.⁹

A problem in the excavation of the borrow areas again arose on May 27, at which time a representative of the contracting officer ordered borrow area number 3 temporarily closed when it was discovered that too large a quantity of sand was being excavated. In a letter of June 1, Mr. Scholer of Harris acknowledged receipt of this closing order and submitted a request for a time extension and additional compensation for the delay and costs that would be incurred by this action.¹⁰ In addition to this delay, he also cited the stockpiling requirement of the April 20 resolution as causing added expense and delay. This request was grounded on Clause 36 of the contract which provides that a price adjustment be made for delays and interruptions of work caused by the Government. It was denied by the contracting officer on a finding that this closing did not cause a delay nor did the stockpiling change the contractor's previous method of work.¹¹ On June 23, another meeting was held between the parties at which time it was decided to permanently close borrow area number 3 because of the unavailability of suitable material in that area. Plans for dressing the area were discussed and agreed upon.¹²

On August 10, Mr. Scholer again wrote to the contracting officer and requested a 90-day time extension.¹³ In support of this request, he recapped all of the difficulties and resulting delays that had been encountered in the excavation work. Particular mention was also made

⁷ Appeal File, Government's letter, April 21, 1964.

⁸ Appeal File, Contractor's letter, April 22, 1964.

⁹ Tr. pp. 320 and 365.

¹⁰ Appeal File, Contractor's letter, June 1, 1964.

¹¹ Appeal File, Government's letter, June 9, 1964.

¹² Appeal File, Government's letter, June 29, 1964.

¹³ Appeal File, Contractor's letter, August 10, 1964.

of the fact that the materials encountered had differed materially from what had been anticipated after studying the contract documents and making field observations prior to preparation of the bid. Subsequent to this request, change orders 3 through 7, bearing dates ranging from August 24 to December 9, were issued granting a total of 116 days of time extension. A large part of this time extension was attributable to the excavation difficulties. A separate extension of 15 days had been granted on March 25, 1964, because of a redesign of the road.¹⁴

On at least one other occasion, the reality of the hardness of the material in the borrow area was recognized by the Government representatives during an inspection of the road. The inspection report transmitted to the Chief Engineer stated that because of the *hardness of the material* certain changes had to be made in the requirements for dressing the slopes.¹⁵ (*Italics added.*)

Counsel for the Government has contended that the contract specifications make no representation as to the material available in the borrow areas,¹⁶ and that only a small amount of oolite was in fact required under the terms of the contract.¹⁷ In support of this point counsel cites the work description which requires "approximately 2500 cubic yards of oolite fill embankment for structures,"¹⁸ and change order number 1 requiring an additional 7520 cubic yards of oolite fill.¹⁹ This position is without merit, however, as it fails to give proper recognition to the remaining portions of the contract and the positive requirements for use of oolite, confirmed by the conduct of the parties. The rather brief description of the work appearing on the front page of the contract and cited above is quite clearly modified by the contract specifications which provide as follows:

SPECIFICATION 503—EMBANKMENT

Clause 503-2.0 MATERIALS:

Delete in its entirety and substitute the following:

Oolite rock shall be used for fill material and shall be obtained from local borrow areas as indicated on the plans or as directed by the Contracting Officer.²⁰

This provision stands out rather prominently because it is a complete revision of the original specifications and is inserted in the contract at the very beginning of the Embankment Specifications. It distinctly requires that oolite be used for all fill material and indicates that this is available in the designated borrow areas. The work drawings, introduced as evidence by the Government, also illustrate that oolite was to

¹⁴ Appeal File, Change Orders, numbers 2 through 7.

¹⁵ Appeal File, Government's Memorandum, November 17, 1964.

¹⁶ Note 1, *supra*.

¹⁷ Note 2, *supra*.

¹⁸ Appeal File, Contract, general description, p. 1.

¹⁹ Appeal File, Change Order 1.

²⁰ Appeal File, Contract Specifications, Section 503-2.0 amendment, p. 2.

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be used for the embankment of the roadway.²¹ Correspondence contained in the appeal file indicates quite definitely that the contracting officer anticipated and intended that oolite would be used for all fill material.²² In view of this manifestly conclusive and uncontradicted evidence, and the rule that contracts are to be read as a whole,²³ the interpretation advanced by the Government is unreasonable and is rejected.

The facts of this case, as evidenced by the correspondence in the appeal file, and the testimony received at the hearing, generally support the position of the contractor that the material that was encountered was not oolite. As a result, the excavation was more time-consuming and expensive than had been anticipated. At the hearing, the contractor called as an expert witness, Mr. John Arribas, an engineer who, at the request of Harris, had visited the site to collect material on which he later performed various tests.²⁴ As a result of these tests and his visual inspection, he submitted a report concluding that the rock formation at the site was not oolite, but a denser and harder substance, probably Fort Thompson Rock or Tamiami Limestone.²⁵ He testified that the tests which he had performed on the materials he collected resulted in a finding that it would take about nine times as much pressure to fracture and shear these materials as would be required in the case of oolite.²⁶ The witness was also asked a number of questions concerning a set of Water Supply Maps introduced as evidence by the appellant. These he said demonstrated that oolite was not available in large quantities in the area of the project site.²⁷

Mr. George Brown, an explosives advisor and technician for a chemical supply company, was also called as a witness by the contractor. He testified that he had been contacted by Mr. Scholer of Harris when the company encountered difficulty in the excavation of the borrow areas. He explained that at the time he first visited the site the contractor was using a method of blasting normally used for oolite excavation, but the results were not satisfactory, for large boulders were being produced that were not suitable for embankment purposes.²⁸ This result he attributed to the hardness and density of the rock material, which in his opinion was not oolite. He suggested and supervised the use of a blasting procedure generally recommended for the ex-

²¹ Government's Exhibit E, sheet 8.

²² Appeal File, Government's letter of April 8, 1964, which instructs contractor to "furnish and compact crushed oolite material as specified in Section 503-2.0." Government's letter of June 9, 1964, which allows use of borrow area number 3 "provided you comply with the terms of the contract and provide only oolite rock and not unsuitable material."

²³ *Fred R. Comb v. United States*, 100 Ct. Cl. 259 (1943).

²⁴ Tr. pp. 15-17.

²⁵ Tr. pp. 18, 22, 41, and 45.

²⁶ Tr. p. 20.

²⁷ Tr. pp. 23-27.

²⁸ Tr. pp. 66 and 68.

cavation of materials which were more dense than oolite. This method required the use of a different type drill, increased drilling work and more dynamite.²⁹ It appears that this procedure worked more satisfactorily and was used with minor alterations throughout the remainder of the excavation. Brown also testified that while he was at the site, test drillings were made in an effort to locate oolite, but that to his knowledge no softer materials were ever discovered.³⁰

Mr. Bramson, the Harris field superintendent, was called upon and testified as to the problems of excavation, the material encountered, and the unsuitability of equipment normally used for oolite excavation.³¹ He cited as causes of delay the presence of boulders in the drag-line³² and the additional time needed to crush the materials after they had been placed.³³ He described the increased costs of trucking and frequent breakdowns of equipment as being causes of added expense.³⁴ The cleanup operation was also mentioned as requiring extra cost and time because of the necessity of removing a large number of boulders that were too hard to be crushed.

Mr. Webber and Mr. Scholer, president and general superintendent of Harris, respectively, were also called upon to testify, and in addition to discussing the problems encountered in the excavation and the increased costs of the work, they stated that they had prepared the bid using their past cost experience for oolite excavation, which they were led to believe was the available material.³⁵ The examination made of their backgrounds reveals that they were quite familiar with the area and experienced in the excavation of oolite for use in fill for roads and similar construction.

The contractor has furnished considerable evidence to demonstrate that the excavated subsurface material was not oolite, but a much harder material that was more expensive to excavate and to crush, and the government has been unable to adequately refute this proof. In fact, testimony introduced at the hearing by the Government tends to support the contractor's claim of added expense.³⁶ One witness did testify that he had seen oolite at the site, but admitted he had no idea how much was available.³⁷ The contractor has never claimed that no oolite was present, only that it was not available in the required amounts.

²⁹ Tr. pp. 69-75.

³⁰ Tr. p. 91.

³¹ Tr. pp. 185 and 194.

³² Tr. p. 191.

³³ Tr. pp. 195-196.

³⁴ Tr. pp. 196-197.

³⁵ Tr. pp. 102 and 136.

³⁶ Tr. pp. 374-375. The assistant park engineer testified that although the contractor's equipment was generally new and in good shape that there was a high rate of breakdowns.

³⁷ Tr. p. 391.

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The Government has also attempted to show that the contractor by confining his excavation to small areas within the large borrow regions might well have failed to discover large quantities of oolite. However, no proof has been offered that there was oolite available, while the maps introduced by the contractor would tend to show the opposite. Such speculative testimony and argument can, therefore, be given little if any weight.³⁸ Based on the evidence received on this question, the Board finds that little if any oolite was present, and that the material encountered required substantially greater costs for excavation and crushing.

The contract issued to Harris covering the work on this project contained the standard changed conditions clause found in Form 23A for construction contracts. This clause provides for equitable adjustment of the contract price when the prevailing physical conditions are not those represented in the contract or are of an unusual nature differing materially from what would normally be encountered in work of a specific nature. In the disposition of this appeal, however, it is not entirely necessary that we decide that a changed condition existed. This case differs from the usual changed conditions case in that when the parties recognized that a problem existed, a change in the contract requirements was agreed upon in order to make the best of the difficult situation. It will be recalled that when the parties met on April 20, the sand and hardness problem were discussed and it was decided "that the sub-base of this road shall be constructed of the borrow material that is quarried from the earth strata beneath the marl overburden and on top of the underlying strata of sand."³⁹ The contractor was also directed to set aside any oolite rock located, and to use it for the upper base of the road. Although this resolution was not labeled as a change order, in effect that is exactly what it was. The contractor was required at that time to excavate a harder material than the contract had originally specified, and to stockpile certain material for later use. The nature and costs of this substituted work have been previously discussed.

Clause 3 of the contract provides that where a change is made in the contract specifications, an equitable adjustment shall be made to compensate for an increase or decrease in cost or time. While this clause requires that a claim for such adjustment be filed within 30 days after receipt of the change order, this requirement does not apply where the change is a constructive one, having arisen out of something

³⁸ *Lottis v. United States*, 110 Ct. Cl. 551, 626 (1948); *United States v. Hercules Co.*, 52 F. 2d 451, 454 (S.D. Miss. 1931); *Abbott Electric Co.*, IBCA-170 (August 12, 1960), 60-2 BCA par. 2744.

³⁹ Appeal File, Government's letter of April 21, 1964.

other than a formal written change order.⁴⁰ Notice of a claim would therefore be required only after results of the change became apparent and before a final release was executed.

In view of our conclusion that notice was not required, the Government's position that the claim was presented untimely would appear to warrant no additional consideration. It is not necessary, however, to decide this case on a constructive change theory. Allowance of the appeal is called for equally on the basis of the finding that the contractor encountered a changed condition of the first category. It was just this type of situation that the changed conditions clause was designed to protect against.⁴¹ Although the changed conditions clause requires that prompt notice be given to the contracting officer, this requirement is satisfied when in fact the Government has knowledge of the situation and the Government's rights have not been prejudiced by a failure to provide formal written notice.⁴² The content and volume of the correspondence between the parties, the meetings between representatives of both sides, and the admitted first-hand knowledge of the park engineer, provide a preponderance of evidence that the contracting officer had adequate notice of the conditions and every opportunity to resolve the existing problem. Moreover, even before the decision was reached to use the unsuitable available material, there had been discussion of using off-site materials. This was rejected, however, as being too costly.⁴³ There is also evidence that the contracting officer knew that extra costs were being encountered and that the contractor expected added compensation to cover these expenses.⁴⁴ In these circumstances, a claim of lack of notice would be unacceptable under either Clause 3 or Clause 4.

Counsel for the Government, in his examination at the hearing and again in his post-hearing brief, repeatedly questioned the manner in which the contractor investigated the site prior to submitting his bid. The contractor plainly asserts that he made only a visual inspection and relied on the contract specifications and his personal knowledge and experience in nearby areas as to the subsurface conditions. Where, as here, there is a changed conditions clause included in the contract, and no more extensive investigation was made by the Government, this is all the site inspection required and a subsurface investigation will

⁴⁰ *Lincoln Construction Company*, IBCA-438-5-64 (November 26, 1965), 72 I.D. 492, 65-2 BCA par. 5234; *Aerodex, Inc.*, ASBCA No. 7121, 62 BCA par. 3492 (1962).

⁴¹ *Fehlhaber Corporation v. United States*, 138 Ct. Cl. 571, 585 (1957); *Layne-Texas Company*, IBCA-362 (January 29, 1965), 72 I.D. 39, 65-1 BCA par. 4658; *James P. Cross, Eng.* BCA No. 2506, 65-2 BCA par. 4488 (1965); *Charles H. Tompkins Co.*, ASBCA No. 2983, 57-2 BCA par. 1522 (1957).

⁴² *Peter Kiewit Sons' Co.*, ASBCA No. 5800, 60-1 BCA par. 2580 (1960); *Korshoj Construction Co.*, IBCA-321, 63 BCA par. 3848 (1963); *Lyburn Construction Co.*, ASBCA No. 9578, 65-1 BCA par. 4645 (1965).

⁴³ Tr. 170.

⁴⁴ Appeal File, Contractor's letter of June 1, 1964.

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not be necessary as long as the conditions are represented in the agreement.⁴⁵ To hold otherwise would be contrary to the purpose of this clause, which was to encourage lower bids by reducing contract risks.⁴⁶ This basic concept has its origin in *Ruff v. United States*, 96 Ct. Cl. 148, 164 (1942), wherein the Court said:

* * * If this situation is not within the contemplation of Article 4, the alternative is that bidders must, in order to be safe, set their estimates on the basis of the worst possible conditions that might be encountered. Such a practice would be very costly to the defendant. We suppose that the whole purpose of inserting Article 4 in the defendant's contracts was to induce bidders not to do that.

For the same reason, the use of the term "unclassified excavation" may not be read as to supersede the changed conditions clause.⁴⁷

The Government has also made reference to the failure of the contractor to request compensation when applying for time extensions, and has indicated that the time granted was a satisfaction of the claim.⁴⁸ This failure to request extra compensation, however, is not fatal to the claim, and the grants of additional time will not be held a bar to a later request for compensation when payment was not a subject of negotiation at the time that the extensions were granted.⁴⁹ A claim for a delay or changed work cannot be satisfied by a grant of a time extension when additional costs have in fact been encountered.⁵⁰

This Board therefore concludes that when the parties recognized that a changed condition existed, the requirements of the contract were changed, and thereafter the contractor performed work that was different and more costly than was originally anticipated and contracted. Nothing that occurred at the time this change was made prejudiced the rights of the Government. We therefore find that the contractor is entitled to an equitable adjustment of his contract price to cover this additional work.

Having decided that a price adjustment is proper, we must consider the question of quantum. Unfortunately, the evidence with respect to the equitable adjustment is based on the undesirable total cost approach,⁵¹ and although the contractor's experience in this type of work and its bookkeeping records provide some assurance that its bidding methods and cost accounting procedures were sound, we can-

⁴⁵ *Herman Groseclose*, IBCA-190, 61-1 BCA par. 2885 (1961); *Lee R. Smith*, ASBCA No. 11135, 66-2 BCA par. 5857 (1966).

⁴⁶ *Erhardt Dahl Andersen*, IBCA-223 and IBCA-229 (July 17, 1961), 68 I.D. 201, 215, 216, 61-1 BCA par. 3082; *Calvada Incorporated*, ASBCA No. 2062, 66-2 BCA par. 1033 (1956).

⁴⁷ Note 46, *supra*.

⁴⁸ Government's Post-Hearing Brief, p. 22.

⁴⁹ *J. G. Watts Construction Co.*, ASBCA No. 9447, 65-1 BCA par. 4593 (1965).

⁵⁰ *Drexler Construction Co.*, ASBCA No. 9776, 66-1 BCA par. 5389 (1966).

⁵¹ *River Construction Corporation v. United States*, 159 Ct. Cl. 254, 271 (1962).

not exclude the possibility that its bid of \$1.60 per cubic yard for excavation may have been too low. The next two higher bids were \$1.92 and \$2.00. The total cost of actual performance as presented may reflect accurately the reasonable additional expenses incurred as a direct result of the changed condition and the change in specifications, but the proof is not sufficiently established or pin-pointed. A more satisfactory method of establishing damages would be (in addition to accurate cost records) to present expert engineering opinion testimony as to the excavation and allied costs the contractor should have expected to have sustained but for the changes and changed conditions, with particular regard to the bid of \$1.60,⁵² and with respect to the additional costs sustained that are directly and reasonably attributable to the work as changed.

In this connection we have observed that the contractor's workmen were experienced and efficient and that the equipment was new or in good condition. It appears that the equipment breakdowns were due in the main to the necessity of processing very hard materials instead of oolite. Moreover, it appears that an additional 117 days were required for completion of the contract, beyond the period originally allowed.

The Supreme Court has ruled that decisions of appeal boards must be based on substantial evidence.⁵³

Accordingly, the appeal is remanded to the contracting officer for negotiating with the contractor the equitable adjustment contemplated by the contract provisions and by this opinion. Such an adjustment may include reasonable amounts for overhead and profit. If the contractor is not satisfied with the amount of the adjustment offered by the contracting officer as a result of such negotiations, the contracting officer shall render his decision as to the amount within a reasonable time and the contractor may file an appeal from such decision within 30 days from his receipt thereof, pursuant to the Disputes clause.

Conclusion

The appeal is sustained and remanded to the contracting officer for equitable adjustment in accordance with the foregoing opinion.

THOMAS M. DURSTON, *Deputy Chairman.*

I CONCUR:

DEAN F. RATZMAN, *Chairman.*

⁵² *Erhardt Dahl Andersen*, Note 46 *supra* at 216: "In a very real sense Clause 4 anticipates that the contractor's bid will reflect neither undue pessimism, nor undue optimism."

⁵³ *United States v. Utah Construction Co.*, 384 U.S. 394, 420 (1966).

CONTINENTAL OIL COMPANY ET AL.

A-30424

*Decided August 2, 1967***Oil and Gas Leases: Assignments or Transfers—Oil and Gas Leases: Rentals—Oil and Gas Leases: Royalties—Outer Continental Shelf Lands Act: Oil and Gas Leases**

The Secretary of the Interior is authorized under section 5(a)(1) of the Outer Continental Shelf Lands Act to approve an assignment of rights in a portion of the area of an outer Continental Shelf oil and gas lease to a depth limited to the base of a specified zone, but such an assignment will result in the creation of a separate and independent lease as to the portion of the land assigned, and, in the absence of any express provision to the contrary, the holder of each lease resulting from the assignment is chargeable for the payment of rental or royalty for the entire area covered by his lease in accordance with the terms of the original lease notwithstanding that this may result in multiple payment of rental or royalty for the same area.

Oil and Gas Leases: Assignments or Transfers—Outer Continental Shelf Lands Act: Oil and Gas Leases

Authority does not exist under the mineral leasing laws for recognizing oil interests separate and apart from gas interests in the same land, and the Department cannot approve an assignment which recognizes, in the same land, oil interests in one party and gas rights in another.

Oil and Gas Leases: Assignments or Transfers

An instrument in which an assignor agrees to "grant, bargain, sell, convey, transfer, assign, set over, abandon and deliver" all of the assignor's interest in a part of a leasehold is an assignment rather than an operating agreement and, if approved, has the effect of segregating the original lease into separate leases in accordance with the terms of the assignment.

Oil and Gas Leases: Assignments or Transfers—Outer Continental Shelf Lands Act: Oil and Gas Leases

Where the Department has given its approval to assignments which would segregate an Outer Continental Shelf oil and gas lease into separate leases by area, depth and product, and where it appears that it was not the intent of the assignors or assignees to create such separate lease interests, and it is not clearly shown that the Department intended to approve such assignments or that it had authority to approve them even if approval were intended, the approval will be rescinded, and the parties to the assignments will be permitted to submit for approval proper instruments reflecting their intent.

APPEAL FROM REGIONAL OIL AND GAS SUPERVISOR

Continental Oil Company,¹ Tenneco Oil Company, and Tennessee Gas Transmission Company have appealed to the Director, Geological

¹Continental Oil Company has appealed as the designated operator for the CATC Group, comprising Continental Oil Company, The Atlantic Refining Company, Tidewater Oil Company and Cities Service Oil Company (formerly Cities Service Production Company), hereafter referred to as CATC.

Survey, from separate decisions of the oil and gas supervisor, Gulf Coast Region, dated December 2, 1964, which notified them of the status of their respective interest in Outer Continental Shelf oil and gas leases OCS 0593, 0593-A, 0593-B, 0594, 0594-A and 0594-B and advised them of the rental and royalty payments determined to be due under the terms of the leases. At the request of the Director, Geological Survey, and because of the nature of the issues in controversy, the Secretary of the Interior has assumed jurisdiction in the matter.

Leases OCS 0593 and 0594 were issued to CATC, effective September 1, 1955, for Blocks 198 and 199, respectively, Ship Shoal Area, Louisiana offshore operations. The leases were issued for terms of five years and as long thereafter as oil and gas should be produced from the leased areas in paying quantities, each lease embracing an area of 5,000 acres. Under the terms of each lease the lessee was required:

* * * To pay the lessor on or before the first day of each lease year commencing prior to a discovery of oil or gas on the leased area, a rental of \$3. per acre or fraction thereof, or

* * * To pay the lessor in lieu of rental at the expiration of each lease year commencing after discovery a minimum royalty of \$3. per acre or fraction thereof, if there is production, the difference between the actual royalty paid during the year and the prescribed minimum royalty, if the actual royalty paid is less than the minimum royalty.

On September 15, 1960, both leases were reported by the oil and gas supervisor, Gulf Coast Region, to have been in a producing status at the expiration of their five-year terms on August 31, 1960.

On May 10, 1961, Continental Oil Company filed for approval in the New Orleans office of the Bureau of Land Management instruments purporting to effect a transfer of a part of the lessees' interests in each of the two leases to Tennessee Gas Supply Company and Tenneco Oil Company.² Under the terms of the instruments CATC transferred to Tennessee its interest in the leases so far as they covered gas down to and including the base of the MI Sand in the $W\frac{1}{2}W\frac{1}{2}NE\frac{1}{4}$, $NW\frac{1}{4}$, $NW\frac{1}{4}SW\frac{1}{4}$ and $N\frac{1}{2}NE\frac{1}{4}SW\frac{1}{4}$ Block 198 (OCS 0593) and the $E\frac{1}{2}NE\frac{1}{4}$, $E\frac{1}{2}W\frac{1}{2}NE\frac{1}{4}$, $NE\frac{1}{4}SE\frac{1}{4}$, $N\frac{1}{2}SE\frac{1}{4}SE\frac{1}{4}$ and $NE\frac{1}{4}NW\frac{1}{4}SE\frac{1}{4}$ Block 199 (OCS 0594).

Oil rights in the same areas and to the same depth were transferred to Tenneco, and CATC retained all lease rights to oil and gas below the MI Sand in the lands described and all such rights in the remain-

² The transfer for each lease was made by four essentially identical agreements, entitled "Act of Sale and Mortgage and Pledge," whereby each of the companies, designated as "Grantor," comprising CATC transferred its one-fourth interest in a part of the leasehold to Tennessee Gas Supply and Tenneco, designated as "Grantees." By a decision dated September 7, 1961, the manager of the New Orleans office approved assignments, executed on June 27, 1961, of the record title interests of Tennessee Gas Supply Company to Tennessee Gas Transmission Company. Tennessee Gas Supply Company and its assignee are hereafter referred to as Tennessee, and Tenneco Oil Company is hereafter referred to as Tenneco.

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ing lands included in the leases. Production in each instance was obtained only from the transferred portion of the leasehold and was limited to oil. Gas had been found in the transferred portions but had not been produced. There had been no discovery of oil or gas in the areas retained by CATC including the portions underlying the base of the MI Sand in the areas transferred.

The Director, Bureau of Land Management, in a decision dated June 22, 1961, and approved by the Acting Secretary of the Interior on the same date, approved the transfers as assignments to Tennessee and Tenneco, stating that the assignments "result in segregation of leases by surface area, depth and product," and that "record title" in Blocks 198 and 199 would be held as then set forth in the decision. The assigned portions of the leases were designated as leases OCS 0593-A and 0594-A, respectively, and the retained portions remained under the original designations.

In response to a request from the Director, Geological Survey, for clarification of the rental and minimum royalty status of the various lease interests held by the appellants, the Associate Solicitor, Division of Public Lands, in an opinion dated October 7, 1964, found that:

(1) Although the Department's regulations do not provide for the assignment of such interests as were assigned here, the Outer Continental Shelf Lands Act, 67 Stat. 462 (1953), 43 U.S.C. §§ 1331-1343 (1964), permits the Secretary of the Interior to authorize a lessee to assign the rights in a portion of his lease to a depth limited to the base of a specified sand or zone, but an assignment of this nature requires specific approval of the Secretary (citing a memorandum of June 3, 1960, from the Associate Solicitor, Division of Public Lands, to the Director, Bureau of Land Management);

(2) Since the lease interests created by assignment here are based on the Secretary's general authority under the statute, and not on regulation, the determination of what lease interests have been created by the assignments must be based entirely on the terms of the assignments which the Secretary approved;

(3) The decision of June 22, 1961, approving the assignments is inconsistent on its face in (1) stating that the leases are segregated as to area, depth and product and (2) approving assignments which segregated the leases as to area and depth but failed to segregate them as to product;

(4) The assignments to Tenneco and Tennessee were made by the same instrument, and that instrument does seem to regard certain obligations as joint obligations of both assignees, but there is no unity of possession between the two or common ownership of any property;

thus, the assignments, in fact, segregated each of the original leases into three, rather than two, leases;

(5) When a lease is segregated upon the basis of area, depth or product, each of the leases thus created becomes an independent unit for which royalty or rental must be paid, and where a lease is segregated by depth or by product rental or royalty must be paid for each portion even though the United States may thereby collect several rentals and royalties on the same acreage;

(6) Where a lease has been placed in a royalty-paying status following a discovery of oil or gas, and the producing portion of the leased area is assigned, the retained area, on which there has been no discovery, reverts to a rental-paying status.

Pursuant to these findings the manager of the New Orleans office of the Bureau of Land Management issued a decision on October 28, 1964, further segregating leases OCS 0593-A and 0594-A into leases OCS 0593-A, 0593-B, 0594-A and 0594-B, the "A" leases reflecting the oil rights assigned to Tenneco and the "B" leases reflecting the gas rights assigned to Tennessee. By a decision dated December 2, 1964, the regional oil and gas supervisor notified Continental that leases OCS 0593 and 0594 are deemed to have been in rental status since September 1, 1961, and that rentals of \$15,000 have accrued under each lease for the lease years beginning September 1 of the years 1961, 1962, 1963 and 1964. By separate decisions of the same date he notified Tennessee that lease OCS 0593-B is deemed to have been in minimum royalty status since September 1, 1961, and minimum royalties of \$6,096 have accrued under the lease for lease years ending August 31, 1962, 1963 and 1964, and that lease OCS 0594-B is deemed to have been in minimum royalty status since September 1, 1961, and minimum royalties of \$4,455 have accrued for each year during the same period.

The substance of these determinations is that:

(1) CATC is required to pay rental of \$3 per acre for the entire area covered by the original leases for each lease year which commenced after the effective date of the assignments; and

(2) Tennessee is required to pay minimum royalty of \$3 per acre for its interest in the gas rights in 2,032 acres in lease OCS 0593-B and 1,485 acres in lease OCS 0594-B.

These rental and minimum royalty payments are in addition to the payment of royalty based upon production by Tenneco for its interest in the oil rights in those portions of the leaseholds covered by leases OCS 0593-A and 0594-A. Thus, under this interpretation of the leases, the United States is entitled to receive rental and royalty payments of at least \$9 per acre for those areas which are included in OCS 0593, 0593-A and 0593-B and in OCS 0594, 0594-A and 0594-B.

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In appealing from the decisions of the regional oil and gas supervisor Continental contends, in substance, that:

(1) There is no regulation requiring payment of rental on the retained nonproducing acreage;

(2) The Secretary has broad discretionary power to approve assignments which he exercised in this case without qualification and in the face of a statement in the application for approval of the assignments that in no event would the minimum royalty ever be more than that provided for in the basic leases, or \$15,000 per year for each 5,000-acre lease;

(3) The fact that an assignment may create segregated leases cannot increase the contractual obligations agreed upon by lessor and lessee.

It is further argued by Continental that actual royalty payments have far exceeded the minimum royalty or rental called for by the leases and that there is not a sound basis for calling upon CATC to pay additional rental on the retained portions of the leases.

Tenneco and Tennessee, in joint appeals, contend that the Associate Solicitor's opinion rests basically upon two erroneous findings of fact, *i.e.*, that (1) the Acting Secretary of the Interior, in approving the assignments from CATC to Tennessee and Tenneco, intended a "segregation by surface area, depth, and product," and (2) there is no "unity of possession" or "common ownership of property" by Tennessee and Tenneco.

The provisions of the Outer Continental Shelf Lands Act on assignments are brief and general. Section 5 of the act, 67 Stat. 464 (1953), 43 U.S.C. § 1334 (1964), states simply that

* * * the rules and regulations prescribed by the Secretary thereunder may provide for the assignment or relinquishment of leases * * *

The legislative history of this provision shows that when the legislation was originally passed by the House it contained a provision that certain sections of the Mineral Leasing Act of 1920, 41 Stat. 437, as amended, 30 U.S.C. § 181 *et seq.* (1964), including section 30(a) governing assignments, were made applicable to OCS leases. This Department, however, in its report of June 8, 1953, to the Senate Committee on Interior and Insular Affairs, recommended enactment of a general provision, saying:

If the authority to promulgate regulations on these subjects is cast in general terms, the Department would be free to incorporate the provision of the Mineral Leasing Act on the same subjects, but would also be free to modify them as circumstances peculiar to operations and actual experience in administering a leasing program in the submerged lands made appropriate. S. Rep. No. 411, 83d Cong., 1st sess.

Therefore, the provisions of sec. 30(a) of the Mineral Leasing Act and rulings of the Department under that section are pertinent to a consideration of assignments of OCS leases.³

An assignment is one of the two general modes of transferring interests in oil and gas leases. The other is by the execution of operating agreements. The distinguishing feature between assignments and operating agreements is that by an assignment the record title of the assignor to the interest transferred is conveyed to the assignee and the latter assumes the contractual relationship of the assignor to the United States to the extent of the interest which is transferred. This is clearly spelled out in the provisions of section 30(a) of the Mineral Leasing Act, *supra*, fn. 3. In the case of an operating agreement, the lessee transfers rights in the lease, such as the right to drill and produce, to another, but he does not purport to divest himself of any record title to any interest in the lease, and the operating agreement does not create or result in a contractual relationship between the United States and the operator. The latter may contract with the lessee to pay the rentals and royalties due the United States, but the contractual obligation of the lessee to the United States to make these payments remains unchanged. See *Bert O. Peterson et al.*, 58 I.D. 661 (1944), *aff'd Peterson v. Ickes*, 151 F. 2d 301 (D.C. Cir. 1945), *cert. denied* 326 U.S. 795. In other words, the operating agreement is a subsidiary arrangement worked out by the lessee and the operator within the framework of the lease between the lessee and the United States, which remains intact. It is true that the Department approves operating agreements but the approval is merely a recognition of the operator as a qualified driller and a finding that there is nothing in the agreement in conflict with the terms of the lease. *Bert O. Peterson, supra*.⁴

³ Section 30(a), as enacted on August 8, 1946, 60 Stat. 955, provides in pertinent part as follows:

"* * * any oil or gas lease * * * may be assigned * * *, as to all or part of the acreage included therein, subject to final approval by the Secretary and as to either a divided or undivided interest therein * * *. Until such approval, however, the assignor * * * shall continue to be responsible for the performance of any and all obligations as if no assignment * * * had been executed. The Secretary shall disapprove the assignment * * * only for lack of qualification of the assignee * * * or for lack of sufficient bond: *Provided, however*, That the Secretary may, in his discretion, disapprove an assignment of a separate zone or deposit under any lease, or of part of a legal subdivision. Upon approval of any assignment * * *, the assignee * * * shall be bound by the terms of the lease to the same extent as if such assignee * * * were the original lessee, any conditions in the assignment * * * to the contrary notwithstanding. Any partial assignment of any lease shall segregate the assigned and retained portions thereof, and as above provided, release and discharge the assignor from all obligations thereafter accruing with respect to the assigned lands; * * *."

⁴ This does not mean that it is always easy to determine whether an instrument is an assignment or an operating agreement. The provisions of the instrument govern, rather than the name given to it. See *Associated Oil Company*, 51 L.D. 241 (1925); *Associated Oil Company*, 51 L.D. 308 (1925); *Solicitor's Opinion*, 52 L.D. 359 (1928).

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The Department has commonly approved three different types of assignments of interests in Federal oil and gas leases. The first, and simplest, type of assignment is that in which the original lessee assigns his entire interest in a lease to another party, in which case the terms and the identity of the lease remain unchanged, the only innovation being the substitution of one lessee for another. The second type is an assignment of an undivided interest, either in the entire acreage of the leasehold or in a portion of the acreage. This type of assignment, like the first, does not affect the identity or terms of the lease. Rather, the lessees, regardless of their number or the varying interests which they may hold, as a body, retain the relationship of the original lessee to the United States under a single lease agreement. See *Kirby Petroleum Company et al.*, 67 I.D. 404 (1960). In the third type of assignment that has been recognized, the lessee assigns to another party the *entire interest* in a *part of the area* covered by the lease. The effect of such an assignment is to create fully independent leases which, the Department has held, are for all purposes, including the duration of the lease terms, the same as though they had been separately issued. See *C. W. Grier and George Etz*, 58 I.D. 712 (1944); *Ray Sorrell*, 59 I.D. 278 (1946); *Luna C. Wootton*, 60 I.D. 236 (1948); *Champlin Oil and Refining Company et al.*, 66 I.D. 26 (1959).

These three types of assignment are recognized as to public land oil and gas leases by section 30(a) of the Mineral Leasing Act, *supra* fn. 3, and by the regulations issued thereunder. 43 CFR 3128.1 and 3128.4. They are also provided for by regulation as to OCS leases. 43 CFR 3385.1 and 3385.4(a).

A fourth type of assignment is authorized by section 30(a) of the Mineral Leasing Act, namely, an assignment of a lease as to a separate zone or deposit. However, prior to the enactment of section 30(a) in 1946, it was the firm and unwavering policy of the Department not to approve assignments of separate formations or strata. The Department refused approval because of the administrative complexities that would result from having separate lessees for separate sands or formations underlying the same surface acreage.⁵ Since the enactment of section 30(a), the Department has indicated its continued reluctance to approve such assignments, saying in 43 CFR 3128.1 that an assignment of a separate zone or deposit "will not be approved unless the necessity therefor is established by clear and convincing

⁵ Decision of Commissioner of General Land Office, approved by First Assistant Secretary, January 31, 1936, Billings 021056; letter from Commissioner to F. T. Fuller, February 5, 1936, Misc. 1625766; letter from Commissioner to David R. Farles, January 14, 1937, Sacramento 019376, 019377; decision of Commissioner, January 11, 1945, Cheyenne 037094.

evidence." Nonetheless it must be recognized that there is authority to approve such assignments. It follows that authority exists to approve assignments of OCS leases as to separate horizons or formations.

A fifth type of assignment of a public land oil and gas lease has been held by the Department to be unauthorized by law. In *Producers and Refiners Corporation et al.*, 53 I.D. 155 (1930), the Department was asked to approve an assignment of all the right, title, and interest of a prospective lessee to the natural gas in the land, the lessee reserving all right, title, and interest in the oil. Refusing to approve the assignment, the Department said:

There is no authority in the general leasing act for recognizing oil interests separate and apart from gas interests in the same land. An oil lease can not be granted to one person and a gas lease to another person for the same land. Inasmuch as interests of oil and of gas in the same land can not be granted in opposition to each other, the department can not approve an assignment which recognizes, in the same land, oil interests in one company and gas rights in another. * * * (P. 157.)

The Department, however, recognized that the two persons could agree with each other that one would develop the gas and the other the oil, presumably under an operating agreement.

With these general principles and considerations in mind concerning assignments, we turn now to the more specific question of the effect of assignments on the original lessee's obligations to pay rentals and royalties.

In the first type of assignment, a complete transfer from the lessee to an assignee, there is no problem. The assignee simply takes over the entire obligation of the lessee.

In the second type of assignment, an assignment of an undivided interest, all parties holding undivided interests are responsible for the rentals and royalties, but the total rental or royalty for the lease remains unchanged.

In the third type of assignment, the assignment of all of the lessee's interest in a part of the area of a lease, in a case where there has been no discovery of oil or gas the effect of the assignment is simply to divide the total rental payment under the terms of the original lease between the current lessees, each lessee becoming separately accountable for payment of rental for the area which he holds in accordance with the terms of the original lease. Thus, if the original lease embraced 5,000 acres of land at an annual rental of \$3 per acre, the total rental payment to which the United States would be entitled would remain \$15,000 whether the leased area were divided among two, three, four or any other number of lessees.

If there has been a discovery on a portion of the lease and production thereon, but the other segregated portion of the lease resulting

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from the assignment does not have production, the respective rental and royalty obligations of each segregated lease are separate as though the leases had originally been issued as separate leases. Thus, the effect of any partial assignment of a producing lease which results in segregation of the lease into separate leases, one of which remains in a royalty status and the other of which reverts to a rental status, may be to increase the totality of the royalty and rental obligation over that of the original lease. That is, the royalty payment which had previously been sufficient payment for the entire original lease area becomes payment only for the lesser area remaining in the producing segregated lease, and the total obligation for the entire area included in the original lease is increased by the amount of the rental for the non-producing segregated lease which has reverted to a rental status. This result inevitably flows from the fundamental concept of the segregation of an oil and gas lease by a vertical partial assignment into separate leases, namely, that each of the leases created by the assignment thereafter stands as an independent lease under which the lessee is individually accountable for compliance with all of the terms of the lease, including the payment of rental or royalty. It is, as has been noted earlier, specifically recognized by section 30(a) of the Mineral Leasing Act, *supra*.

It would, at first, seem logical that the same principle should apply to the fourth type of assignment, one which divides the leased area horizontally rather than vertically. That is, if the entire lease interest is to be divided by any means, the rental or royalty obligation should be proportionately divided among the lessees, so that the totality of the obligation of the several lessees remains the same as that of the original lessee. This simple formula, however, would become very difficult to apply to the horizontal division of a leasehold.

The Mineral Leasing Act and the regulations issued pursuant thereto provide for the computation of rental and minimum royalty solely upon the basis of acreage. Thus, we may divide a 5,000-acre lease by area into any number of smaller leases and readily compute the rental or minimum royalty payments for each lease. The problem, however, would be tremendously complicated by a horizontal assignment. Suppose that a horizontal assignment is made of all formations below 3000 feet in a 5000-acre lease. Would the two lessees divide the rental payment or would each be required to pay the full rental? If the concept of segregated leases obtains as in the case of vertical partial assignments, each lessee would have to pay the full rental since the surface acreage of his lease remains unchanged. Thus double the amount of the rental of the original lease would be payable. If, for some reason, the concept of segregated leases is inapplicable to hori-

zontal assignments, the apportionment of rental among the holders of the separate interests could lead to endless difficulties. Should it be divided equally among the lessees or should it be apportioned on some other basis, such as the thickness of the formations in each lease or the estimated value of each formation? The Department has not had to decide the question since it has refused to approve assignments of separate formations.

Logically, under the established concept of an assignment as a transfer which substitutes one lessee for another and creates a new contractual relationship between the assignee and the United States, the assignee of a separate horizon or formation should be required to pay rental or royalty on the basis of the surface acreage in his lease unaffected by the payment of rental or royalty by the lessee of another formation underlying the same surface acreage. Thus, the effect of any partial horizontal assignment of a producing lease which results in segregation of the lease into separate leases, one of which remains in a royalty status and the other of which reverts to a rental status, may be to increase the totality of the royalty and rental obligation. That is, there is a compounding of payment for the same area because, when separate leases are created, the royalty payment which had previously been sufficient payment for the entire leased area becomes payment only for the separate formation remaining in the producing lease, and the total obligation for the entire area included in the original lease is increased by the amount of the rental for the new nonproducing lease covering the unproductive formation. This is akin to the situation described above resulting from a partial vertical assignment of a lease where production is obtained from one segregated lease but not from another.

Applying these principles to the case at hand, it would have to be concluded that the rental and royalty obligations of CATC, Tenneco, and Tennessee are separate and distinct from each other and that each must pay rental or royalty on its segregated lease irrespective of the obligations of the others as to their segregated leases. (This assumes, for the moment, that separate assignments of the oil and gas rights were authorized.)

Appellants, however, challenge the basic proposition that the instruments which established the present lease interests were intended to have the segregative effect ascribed to them, and, in support of their contention, they assert that:

(1) CATC representatives "hand-carried" the assignments to Tennessee and Tenneco to the Washington, D.C., office of the Department of the Interior where the problems of segregation by depth and segregation by product were discussed with representatives of the Depart-

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ment, and it was agreed that such segregations were impractical and should not take place.

(2) The fact that no segregation by depth or by product was ever intended is confirmed by the letter of May 10, 1961, from Continental (as operator for CATC), requesting approval of the assignments, in which it was stated that:

In order to insure to the United States of America, as Lessor, the payment of this minimum royalty of \$3 per acre Continental Oil Company, as Operator, hereby agrees that should the actual total royalty paid during a lease year on production from either of the basic leases be less than the prescribed \$3 per acre minimum per lease, then Continental Oil Company will pay the difference to the lessor, upon its request, *but in no event shall the minimum royalty ever be more than that provided in the basic lease.* However, should all of the above named four Grantors release all of their retained interest in either lease then as to such lease the lessor will, of course, look to the above Grantee-Operator for payment of the minimum royalty per lease based on \$3 per acre on the part thereof retained by Grantees. (Emphasis added.)

(3) The Director of the Bureau of Land Management and the Acting Secretary of the Interior knew that lease segregation based on separation of "oil rights" from "gas rights" would create great hardships and impractical conditions for both lessor and lessees.

These arguments, in effect, amount to an assertion that the "assignments" were no more than operating agreements. Certainly their effect so far as rental and royalty obligations are concerned is that ascribable to operating agreements. However, this is inconsistent with the language used in the instruments of transfer. Those instruments were entitled "Act of Sale and Mortgage and Pledge," and by those instruments each grantor declared that:

* * * Grantor does by these presents, grant, bargain, sell, convey, transfer, assign, set over, abandon and deliver.

A. Unto Tennessee Gas Supply Company * * * all of Grantor's * * * interest in and to the oil and gas leases which are described * * * in so far and only in so far as said leases cover all gas, as herein defined, at all depths down to and including the base of the MI Sand in and under the lands described * * * and all gas wells and related gas well equipment (surface and subsurface) and well platforms, gathering and flow lines, tanks, separators and other platforms, equipment and personal property located on said leases and used with said wells, with no right of reverter as to such leases, wells, platforms and equipment, and such rights of ingress, egress and easements for such facilities as Grantor has the right to convey; and

B. Unto Tenneco Oil Company * * * all of Grantor's * * * interest in and to the oil and gas leases which are described * * * in so far and only in so far as said leases cover all oil, as herein defined, at all depths down to and including the base of the MI Sand in and under the lands described * * * and all oil wells and related oil well equipment (surface and subsurface) and well platforms, gathering and flow lines, tanks, separators and other platforms, equipment and personal property located on said leases and used with said wells, with no

right of reverter as to such leases, wells, platforms and equipment, and such rights of ingress, egress and easements for such facilities as Grantor has the right to convey.

The Department has held that such language constitutes an assignment and results in the creation of separate leases. *Ray Sorrell, supra; Richfield Oil Corporation*, 65 I.D. 348 (1958). Regardless of any understanding of the lessees and the assignees or any supposed understanding of the Bureau of Land Management, the decision of June 22, 1961, approved the transaction as assignments resulting in the "segregation of leases by surface area, depth and product," which is, indeed, what the language of the instruments of assignment purported to accomplish.

Nonetheless, because the appellants' arguments left some doubt as to their interpretation of the instruments of assignment, appellants were requested by letter dated January 5, 1967, to respond to the following questions:

1. Were the instruments of May 10, 1961, which were approved as assignments of record title, intended to convey record title to some interest in the leased estate, or was it the intent of the parties to enter into an operating agreement which would not affect record title?

2. If operating agreements were intended, why did the instruments use the words 'grant, bargain, sell, convey, transfer, assign, set over, abandon and deliver,' which clearly denote assignments rather than operating agreements * * *?

3. (a) If assignments of record title were intended, what is your view with respect to the authority of the Secretary of the Interior, under the Outer Continental Shelf Lands Act, to approve an assignment which gives to one party the oil rights and to another the gas rights in the same tract of land, and, assuming the authority of the Secretary to approve such an assignment, what are the practical effects of an assignment which severs the oil rights from the gas rights? (In connection with this question see *Producers and Refiners Corporation et al.*, 53 I.D. 155 (1930), in which the Department held that it was without authority, under the Mineral Leasing Act, either to issue separate leases for oil and gas or to approve an assignment which would create separate oil and gas interests.)

(b) If an assignment was intended, but only by area and depth, with the assigned interest going to Tenneco and Tennessee jointly, upon what basis may be the separate clauses conveying the oil rights to Tenneco and the gas rights to Tennessee be construed as a joint assignment of oil and gas rights?

4. What do you consider was the net effect of the Director's decision of June 22, 1961, which approved 'assignments which result in segregation of leases by surface area, depth and product?'

In response to these questions appellants replied that:

1. The instruments of May 10, 1961, conveyed full record title of the CATC companies in and to a portion of both leases involved as provided for in 43 CFR 201.60 (now 43 CFR 3385.1).

2. No operating agreements were involved.

3. a. The Secretary of the Interior has ample authority to approve, upon *any*

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terms he desires, assignments of the nature involved here and approved by Acting Secretary Carr on June 22, 1961. * * *

As to your question of the practical effects of an assignment which "severs the oil rights from the gas rights," we are firmly convinced that the assignments in question did not have this effect. The leases were assigned to Tennessee Gas Supply Company and Tenneco Oil Company jointly. Said leases were assigned to Tennessee insofar as they covered gas and to Tenneco insofar as they covered oil. A severance cannot be made underground by assignment. * * * It is only upon production that each party has full rights of possession, control and disposition of his product.

In regard to your reference to 53 I.D. 155 (1930), * * * the Secretary's authority is determined from the Outer Continental Shelf Lands Act. The Mineral Leasing Act is not applicable.

b. The assignments covered a specified portion of each basic lease down to a specified depth. Insofar as the leases covered gas, they were assigned to Tennessee Gas Supply Company and insofar as they covered oil, they were assigned to Tenneco Oil Company, as more fully detailed in paragraph 3(a) above.

4. The net effect of the Director's decision of June 22, 1961, as approved by Acting Secretary Carr, was to approve assignments of interests in parts of oil and gas leases as allowed under 43 CFR 201.60 (now 43 CFR 3381.1). In pointing out in his decision that he was approving 'assignments which result in segregation of leases by surface area, depth and product,' he was doing so for administrative purposes to set the basis for new lease records in the BLM, as set out in 43 CFR 201.63(a) (now 43 CFR 3385.4(a)) * * *.

This is the only type of segregation provided for in the OCS regulations and is segregation for *administrative purposes only*. A new record is created since the assignees then become "leasees [sic] of the Government * * * bound by the terms of the lease." All royalty and rental provisions of the original lease apply separately to each segregated portion, *but only when they are due under the terms of the original lease*. If Assignors produce the retained acreage, certainly the royalty provided for in the lease must be paid. If there had been no discovery on the 'lease area' defined in the lease, assigned and retained acreage would bear its proportionate part of the maximum \$15,000.00 annual rental provided for in the lease. There has been a discovery on the 'leased area' of 5000 acres per lease and production far exceeds the \$15,000.00 minimum per lease specific in the basic lease contract; therefore, *no rental or minimum royalty payments are due*. The provisions of the lease were not modified by nor intended to be modified by the Director, he and the Secretary having no such authority to enlarge the rental and royalty obligations of the basic lease contract.

This rental and royalty question was squarely before the Secretary and his staff and pursuant to his unquestionable authority he approved the assignments, *without qualification*, based on our application which specifically set forth our understanding that the minimum royalty (or in lieu rental) would *never be more than* that provided in the basic lease. (in original.)

Appellants' answers reveal readily the utter incongruity of the positions which they assume. They argue, for example, that a severance of oil and gas cannot be made underground by assignment, yet they insist that insofar as the basic leases covered gas they were assigned as to a specified area and depth to Tennessee, and insofar as they covered oil in the same strata they were assigned to Tenneco. Precisely what is the nature of the interests purportedly assigned?

By the terms of the basic leases the original lessees obtained from the United States the right to remove oil and gas from the earth within the area covered by their leases. They could themselves remove the minerals, or they could authorize someone else to remove them, or they could assign to other parties, as to all or part of the leased lands, the right which they held under the leases to remove the oil and gas. But all that the lessees could assign was the contractual right which they had with the United States to remove oil and gas from the earth. In other words, they could place another party or other parties in their place in relation to the United States, and by assignment they would create a new lease agreement between the assignee and the United States upon approval of the Secretary or his designee. If, as appellants assert, a severance of the oil and gas rights cannot be effected while the minerals remain underground, how can the lessees assign to one party the gas rights and to another the oil rights? Appellants reply that it is only upon production that each party has full rights of possession, control and disposition of his product, and that until production the operations and obligations of the assignees are joint. If this is so, the assignment to Tennessee and Tenneco was intended, regardless of the wording of the instruments, as the conveyance of a joint interest in the oil and gas rights involved with a division of the oil and gas rights between Tenneco and Tennessee in the nature of an operating agreement. Appellants, however, emphatically deny that any operating agreement is involved, and we are unable to reconcile their conflicting statements as to what was intended.

While appellants deny the applicability of the Department's ruling in *Producers and Refiners Corporation et al.*, *supra*, to a situation arising under the Outer Continental Shelf Lands Act, their arguments support the governing principle of that decision that, in fact, oil and gas rights are not leasable separately, and we find the principle the same whether it is applied to leasing under the Mineral Leasing Act or under the Outer Continental Shelf Lands Act.

The assertion that the segregation of leases provided for by the Department's regulations is "segregation for administrative purposes only" is an interesting argument. We may only speculate as to what purposes appellants have in mind. We have already discussed the effect of an assignment which segregates a lease interest, and if the assignments here do not have the same effect, appellants have suggested no administrative purpose that is to be served.

While there is little in the record to indicate the subjective intent of the Bureau of Land Management in granting approval, past Departmental policy, as well as comments by the appellants, raise serious doubts as to the Bureau's intent to approve assignments which would result in segregation of the leases by area, depth and product. Thus, upon the record as a whole, we are unable to find evidence that there

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was ever a mutual understanding on the part of the appellants and the Bureau of Land Management as to what was intended by the parties to the assignments or what the effect of the assignments would be if approved. Although the appellants continue to insist that the Director's decision of June 22, 1961, correctly held that the assignments result in "segregation of leases by surface area, depth and product," it is abundantly clear that they do not desire that result and that they probably never intended it, and, although the Director's language was explicit in stating the effect of the assignments, it seems doubtful that the practical effect of the words used was fully anticipated by the Bureau. This doubt as to what was understood or meant, however, does not suggest approval of the instruments as something else. Thus, we are unable to give any practical effect to the purported assignments as approved.

Appellants appear to argue, however, that, whether or not the effect of the assignments was that which the Bureau intended, it was nevertheless within the authority of the Director to approve such assignments and that the Department is now estopped from denying the validity of the assignments. If this is their premise, we are unable to assent to its validity. The Department has, on occasion, declined to disturb its approval of an assignment because of a disagreement between the parties to the assignment as to its validity until the dispute was resolved by the parties (see *McCulloch Oil Corporation of California*, A-30208 (November 25, 1964), and cases cited), or because a party to the assignment denied that an assignment was intended (*D. J. Simmons*, 64 I.D. 413 (1957)), or because the parties to the assignment failed to grasp fully the consequences of their action (*Roy M. Eidal, Kern County Land Company*, A-29300 (February 19, 1962)).⁹ On the other hand, approval of an assignment has been held ineffectual where the assigned lease was found to have terminated prior to the attempted assignment (*John E. Miles*, 62 I.D. 135 (1955)), and the Department has revoked its approval of an assignment where the approval was procured by the concealing and misrepresentation of material facts with respect to the interests in the lease (*Hill v. Williams and Liddell*, 59 I.D. 370 (1947)). Although the present case is distinguishable upon its facts from all of those cited, the cited decisions clearly indicate that the Department may, in some circumstances, revoke its approval of a lease assignment. In this instance, we believe

⁹ In *Roy M. Eidal, Kern County Land Company*, *supra*, the Department assumed but did not decide that the Secretary or his delegate has the authority to revoke the approval of an assignment, approval having been revoked by the land office in that case as to one of two assignments for which revocation was sought by the parties to the assignments. Revocation there was predicated upon a finding that the assignment which was invalidated attempted to assign record title to a separate zone or horizon of an oil and gas leasehold contrary to departmental policy and regulation. The Department did not, however, attempt to determine whether or not revocation of approval on that ground would have been warranted had the parties desired the validity of the assignment to be recognized.

that rescission of the approval of the assignments is warranted, if for no other reason, upon general principles governing rescission of contracts.

Although the assignment of an interest in an oil and gas lease is, on its face at least, an agreement involving only the assignor and assignee, since the lease itself is a contract to which the United States is a party, the assignment of an interest in such a lease results in the establishment of new legal relationships between the United States, the lessee and the assignee which must be approved by the Secretary of the Interior before they can become effective. See *C. W. Grier and George Etz, supra*, at 714-715. Thus, the approval of a lease assignment by the Department results in the creation of a contractual relationship involving at least three parties, of which the United States is one, and, in order for that assignment to constitute an enforceable agreement, it is necessary not only that it result in a valid contract between assignor and assignees but that it should also result in valid contracts between the United States and each of those parties.

For the reasons already set forth, we can only conclude that in this case the rescission of the approval of the assignments is called for upon the basis that the instruments of assignment and of approval of the assignments which purport to be evidence of an agreement do not, in fact, establish that an agreement was ever reached and, if an agreement was reached, do not establish the intent of the parties in attempting to enter into that agreement. See 1 *Black, Rescission* § 149 (1916); 7 *Williston, Contracts* §§ 1557, 1570A (rev. ed. 1937); 3 *Corbin, Contracts* § 619 (1960).

Therefore, the decision of the Director, Bureau of Land Management, of June 22, 1961, approving the assignments, the decision of the manager, New Orleans office, of October 28, 1964, and the decisions of the oil and gas supervisor of December 2, 1964, determining the respective lease interests and the status of each, are vacated, and approval of the assignments is revoked without prejudice to the right of appellants to submit for approval instruments which will reflect their intent either to enter into an operating agreement or to effect an acceptable assignment of some assignable interest in the leases. To avoid as much disruption in the relationship of the parties as possible, the rescission of approval of the assignments will not become effective until August 30, 1967, prior to the expiration of the current lease year, unless all the parties request that it be made effective at an earlier date. By letter of August 23, 1967, the Assistant Secretary for Public Land Management postponed the effective date of the rescission of the approval of the assignments until October 30, 1967.

HARRY R. ANDERSON,

Assistant Secretary of the Interior.

August 8, 1967

UNITED STATES

v.

ED BERGDAL

A-30752

*Decided August 8, 1967***Mining Claims: Determination of Validity**

Although the administration of the national forests is vested in the Secretary of Agriculture, the Secretary of the Interior has the responsibility of determining the validity of mining claims in the national forests and providing the administrative forum by which that Department may determine its right to possession, control, and administration of lands on which mining claims have been located within a national forest.

Mining Claims: Generally—Surface Resources Act: Generally

Where a mining claimant files a verified statement pursuant to a proceeding initiated by the Forest Service in accordance with section 5 of the Surface Resources Act and the Forest Service subsequently recommends the initiation of a contest proceeding under the general mining laws to determine the validity of the claim (rather than a proceeding under section 5(c) of the act to determine the Government's right to manage the surface resources), since the responsibility for the administration of the use and occupancy of the national forests is vested in the Department of Agriculture, this Department is without the authority to inquire into the reasons or justifications for the initiation of such a proceeding and is without the authority to change, as a matter of its own policy, the nature of the proceeding from the one recommended by the Forest Service.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The Forest Service, United States Department of Agriculture, has appealed to the Secretary of the Interior from a decision of the Office of Appeals and Hearings, Bureau of Land Management, which modified a decision of a hearing examiner that declared null and void the "H" lode mining claim, situated in sec. 1, T. 20 N., R. 17 E., W. M., Kittitas County, Washington, in the Wenatchee National Forest, and, instead, declared the claim to be subject to the limitations or restrictions provided for in section 4 of the Surface Resources Act of July 23, 1955, 30 U.S.C. § 612 (1964).

Bergdal filed a verified statement on July 16, 1957, claiming rights contrary to or in conflict with the limitations or restrictions provided for in section 4 of the Surface Resources Act, *supra*, which gives the right prior to the issuance of a patent to a mining claim to the United States to "manage and dispose of the vegetative surface resources" on the claim and "to manage other surface resources thereof (except mineral deposits subject to location under the mining laws of the United States)." Bergdal filed his statement after a proceeding was

initiated by the Forest Service in accordance with section 5 of the Surface Resources Act, 30 U.S.C. § 613 (1964), which provides a means by which determinations may be made as to whether unpatented mining claims are subject to the limitations as to surface use of the resources of the claims as provided in section 4 of the act.

After notification by the land office at Spokane, Washington, that Bergdal had filed a verified statement, a mining engineer of the Forest Service examined the claim on September 18, 1958. After the examination of the claim it appears that the Forest Service made no recommendation to the land office that a hearing be held to determine whether the Government had the right to manage the surface resources as prescribed by section 5(c) of the act. Instead, by letter dated October 31, 1962,¹ the Forest Service requested that Bergdal waive the verified statement he had filed on July 16, 1957, which would give to the Government the use of the surface resources on the claim. In return for such a waiver, the Forest Service offered Bergdal a 10-year special use permit which would allow him to maintain his cabin on the claim. In addition, the Forest Service informed Bergdal that if he was not willing to accept this proposal, it would contest the validity of his claim in a proceeding before the Bureau of Land Management, and that if the claim was declared null and void, he would then be given a short time to remove his buildings. Bergdal did not execute the waiver.

On October 3, 1963, a mining engineer of the Forest Service again examined the claim. Upon recommendation of the Forest Service, dated February 12, 1964, the Bureau of Land Management filed a contest complaint on March 12, 1964, in which the sole charge was that minerals had not been found within the limits of the claim in sufficient quantities to constitute a valid discovery. A hearing was held on July 30, 1964, in Ellensburg, Washington.

At the commencement of the hearing Bergdal filed two motions to dismiss the proceeding on the grounds that (1) no challenge of the validity of the claim could be made in a proceeding initiated under the Surface Resources Act (Ex. A), and (2) since the Forest Service recognized the validity of the claim without surface rights, *i.e.*, it agreed to his occupancy of the claim by special use permit if he waived his rights to the surface, the Forest Service could not challenge the validity of the claim with surface rights, since the validity of the claim was not dependent upon surface rights (Ex. B). The hearing examiner explained that the contest was not brought under the Surface Resources Act (Tr. 5) and that until issuance of a patent, legal title re-

¹ The letter is a result of a personal discussion held on October 27, 1962, between Bergdal and an official of the Forest Service, whereby Bergdal was informed that from the mineral examination of September 18, 1958, the Forest Service believed his claim to be invalid.

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mains in the Government, and the Department of the Interior has the authority to inquire into the validity of a mining claim (Tr. 6-8), and dismissed both motions. From the evidence presented at the hearing, by decision dated March 16, 1965, the hearing examiner declared the "H" lode mining claim to be null and void.

Bergdal appealed to the Director, Bureau of Land Management, wherein he reasserted substantially the same contentions made in his motions to dismiss. He also discussed discovery under the mining laws and cases referred to by the hearing examiner in his decision. After a careful examination of the record the Office of Appeals and Hearings concluded that "there is no doubt as to the correctness of the Examiner's holding that the contestee is still prospecting and that he has made no discovery of a valuable mineral within the meaning of the United States mining laws."

However, in regard to Bergdal's motions to dismiss, the Bureau stated:

The Examiner was technically correct in dismissing the motions of contestee. In *United States v. Ford M. Converse*, 72 I.D. 141 (1965), the Department held (syllabus): "The Department of the Interior has been granted plenary power in the administration of the public lands, and, until the issuance of a patent, legal title to a mining claim remains in the Government, and the Department has power, after proper notice and upon adequate hearing, to determine the validity of the claim." Nevertheless, we feel that there is merit to the appellant's contention in Exhibit A, when we consider certain facts in the case record in the light of the expressed policy of the Bureau of Land Management, which leads us to conclude that the contest proceeding to determine validity of the claim was not justified in this case and that the Forest Service should have requested a hearing pursuant to Section 5 of Public Law 167 [Surface Resources Act] to determine surface rights as defined in Section 4 of that act.

Public Law 167 affords the Government remedies which may be neither mutually exclusive nor interchangeable with contest actions predicated on the basic mining laws, but each must be used in accordance with its intended purpose and the objective sought. If the interests of the Government require that it exercise exclusive jurisdiction over the land and the evidence indicates that the mining claims involved are invalid, a regular contest action should be brought. If, however, only the use of the surface and use and disposal of the vegetative surface resources are desired and if mining operations would unreasonably interfere with such uses, then section 5 of the Act should be utilized. * * *.

The Bureau then discussed the various factors upon which it based its conclusion that a contest proceeding to determine the validity of a claim was not justified in this case, such as the bona fides of the claimant and the Forest Service's offer of a special use permit. It noted that the issue in a contest to determine the validity of a claim is whether a discovery under the mining laws has been made and that the issue in a proceeding under section 5 of the Surfaces Resources Act is whether a discovery under the mining laws has been made prior to the date of

the act, citing *United States v. Elizabeth D. Houston*, A-30395 (September 9, 1965), and *United States v. Independent Quick Silver Company*, 72 I.D. 367 (1965). It concluded that the hearing in question "may be considered as a hearing pursuant to section 5." Accordingly, the Bureau affirmed the decision of the hearing examiner insofar as it held that there was no discovery on the claim within the meaning of the mining laws, but modified the decision "to the extent that instead of the 'H' lode mining claim being declared null and void, it is declared to be subject to the surface restrictions and limitations" provided by section 4 of the Surface Resources Act, *supra*.

The Forest Service appealed to the Secretary of the Interior from "so much of the decision" as holds that the "H" lode mining claim is not null and void but is merely subject to the surface restrictions and limitations of the Surface Resources Act. The Forest Service contends that since the responsibility for the administration of the lands within the national forests is vested in the Forest Service, once it determines the manner in which the administration thereof would best serve the interests of the United States, *i.e.*, recommends to the Bureau of Land Management that a proceeding against a mining claimant be initiated either under the basic mining laws or under the Surface Resources Act, the Bureau of Land Management has no authority to inquire into the reasons why the Forest Service initiated the proceeding or to change the nature of the proceeding from that recommended. The Forest Service, in effect, contends that since the sole function of the Bureau of Land Management is to determine the issue set forth in the contest complaint, it must proceed with the hearing as requested, if the elements of a contest are present, even though such a proceeding may conflict with its own policy in administering mining claims on the public lands. To support this contention the Forest Service refers to a Memorandum of Understanding executed by the Bureau of Land Management and the Forest Service, effective May 3, 1957. VI BLM Manual 3.1, Illustration 4 (June 21, 1962).

In answer to the contentions set forth in the appeal of the Forest Service,² Bergdal argues that the Memorandum of Understanding merely gives "procedural directions" and does not vest any responsibility for determining "how to deal with mining claim problems in the national forests" in the Forest Service, and that the Bureau of Land Management, in ruling that a contest proceeding to determine the validity of the claim was not justified in this case, held that elements of a contest were not present. He also contends, in effect, that since the Forest Service occupies a position similar to a "rival claimant" in a proceeding contesting a mining claim, citing *H. H. Yard et al.*, 38 L.D. 59, 67 (1909), this Department has the authority to reverse

² Bergdal did not appeal from the decision of the Bureau.

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a decision of a hearing examiner if it finds that the procedure instituted was an improper one.³

Bergdal also recites various facts lending support to the Bureau's conclusion that the proceeding in question was not justified, *i.e.*, the Bureau seems to infer that once the Forest Service initiated a proceeding under the Surface Resources Act, it was not justified in subsequently initiating a contest to determine the validity of the claim and to have it declared null and void. He particularly refers to the letter of October 31, 1962, in which the Forest Service set forth the proposition that if he did not agree to execute a waiver and accept a special use permit, it would schedule a hearing and have his claim declared null and void.

In regard to such methods, Bergdal states:

This pressurizing of a claimant to induce him to give up his surface rights without a hearing on that question, by threatening to institute invalidation proceedings against his claim if he does not yield, does not impress one as a very fair procedure. Some would say it smacks of blackmail. A claimant ought not to be penalized for choosing an alternative provided for him by law. * * *

In view of these circumstances the Bureau's holding that the proceeding in question was not justified and its objection to being a party to such a proceeding is more readily understood. However, it is not necessary to consider the question of whether the Forest Service was justified in instituting a proceeding to determine the validity of the claim, for we do not believe this Department has the authority to question, as a matter of its own policy, the manner in which the Department of Agriculture administers the national forests, including the methods employed by that Department in dealing with mining claimants in the national forests.

The subject of the respective jurisdiction of the Secretary of the Interior and the Secretary of Agriculture over lands constituting a part of the national forests has received frequent consideration. Prior to February 1, 1905, the national forests were administered by the Department of the Interior. Under section 1 of the act of February 1, 1905, 16 U.S.C. § 472 (1964), a division of jurisdiction was provided

³ Upon the same premise, *i.e.*, that the Forest Service is no more than a rival claimant, Bergdal states in his answer, which does not directly relate to the issue on appeal, that he believes the Bureau has recognized the "validity of the claim as an unpatented claim" or a "location" and although he has "not as yet proved a discovery for a title under the mining laws, * * * he has made a sufficient showing to justify his working and holding the claim under a location * * *." What rights Bergdal may believe the decision of the Bureau entitles him to is not clear. However, it is clear that the Bureau recognized the invalidity of the claim, but, as a matter of policy, held that where the exclusive use of the surface was not required, the Forest Service was not justified in initiating a proceeding to determine the validity of the claim. The net effect of the decision placed Bergdal in the same position as if he had waived his verified statement, except that the Forest Service may not have issued him a special use permit.

with respect to national forest lands. The act charged the Secretary of Agriculture with the duty of executing all laws affecting the national forests, "excepting such laws as affect the surveying, prospecting, locating, appropriating, entering, relinquishing, reconveying, certifying, or patenting of any of such lands." The administration of the laws included within the exception remained the responsibility of the Secretary of the Interior.

In construing the statute, the Secretary of the Interior in a letter to the Secretary of Agriculture, dated June 8, 1905, advised that:

* * * it is believed the respective jurisdictions of the two departments over applications for rights and privileges within forest reserves may be safely defined as follows, namely, that your Department is invested with jurisdiction to pass upon all applications under any law of the United States providing for the granting of a permission to occupy and use lands in a forest reserve which occupation or use is temporary in character, and which, if granted, will in nowise affect the fee or cloud the title of the United States should the reserve be discontinued, but that this Department retains jurisdiction over all applications affecting lands within a forest reserve the granting of which amounts to an easement running with the land, with the further understanding that any permission or license granted by your Department is subject to any later disposal of the land by this Department. Within the limits of the separate jurisdictions herein defined, it is believed that the actions of the two departments will proceed harmoniously. 33 L.D. 610.

By letter of June 13, 1905, the Secretary of Agriculture expressed his concurrence in the views quoted above.

Additional correspondence between the two departments on the specific subject of the jurisdiction of the Secretary of the Interior over lands located and claimed under the mining laws and constituting a part of the national forests is referred to in the *Yard* case, *supra*, in discussing the practice of contesting mining claims within the national forests, as follows:

In departmental letter of July 5, 1906, addressed to the Secretary of the Department of Agriculture, * * * the following opinion is expressed:

"There would seem to be no good reason, however, why the character of lands in forest reserves, located and claimed under the mining laws, may not be determined by the land department in the absence of entry or application for mineral patent, where such determination appeared to be necessary to the due and proper administration by your department of the laws providing for the protection and maintenance of such reserves. The land department unquestionably has jurisdiction over any and all lands embraced within such locations for the purpose of determining whether they are of the character subject to *occupation and purchase* under the mining laws."

Since that time essentially similar views have been reiterated in the regulations of May 3, 1907 (35 L.D. 547), and the circulars of June 26, 1907 (35 L.D. 632), and June 23, 1908 (36 L.D. 535). See also, instructions of May 15, 1907 (35 L.D. 565). 38 L.D. 62, 63.

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The practice outlined in these early regulations is essentially the same as the current practice set forth in the Memorandum of Understanding, effective May 3, 1957, *supra*, between the Bureau of Land Management, Department of the Interior, and the Forest Service, Department of Agriculture, in pertinent part, as follows:

D. ADVERSE PROCEEDING UNDER BASIC MINING LAWS

1. Applicable procedures

When the Forest Service desires to recommend adverse proceedings against an unpatented mining claim on lands within a national forest under authority of the basic mining laws of 1872, it will do so by filing with the appropriate land office a recommendation for initiation of Government contest. The filing of such recommendation, form and content thereof, and all other matters relating to scheduling and conduct of a hearing and decision thereon will follow the procedures in Part A, section 4 to 14 inclusive, of this Memorandum of Understanding.

Section 4 of Part A provides that the recommendation contain a copy of the "report of field examination, upon which the recommendation is based." Section 5 of Part A provides that upon "receipt from the regional forester of a recommendation for initiation of a Government contest, the manager, upon determining that the elements of a contest are present, will prepare, and proceed with service * * *."

Thus, under these laws and their subsequent interpretation there is no question that the Secretary of the Interior is authorized to determine the validity of mining claims in national forests. *H. H. Yard, supra; Alaska Copper Company*, 43 L.D. 257 (1914); *J. B. Nichols and Cy Smith*, 46 L.D. 20 (1917); *United States v. R. G. Crocker et al.*, 60 L.D. 285 (1949); *Solicitor's Opinion*, M-31021 (February 20, 1941), pp. 16-22; 29 Op. Atty. Gen. 303, 305, 306 (1912); 30 Op. Atty. Gen. 263, 269 (1914). It is the responsibility of this Department to provide the administrative forum by which the Forest Service may determine its rights to possession, control and administration of lands within a national forest on which mining claims have been located.

The jurisdiction of the Secretary of Agriculture was positively defined by the Attorney General in connection with the question as to who had authority to grant easements for certain rights-of-way over lands that constitute a portion of the national forests. The Attorney General after quoting the observations of the Secretary of the Interior in his letter of June 8, 1905, *supra*, stated:

The view thus set forth seems to have received the express approval of the Secretary of Agriculture. It was at once accepted, and has since been consistently acted upon by both departments.

In 28 Op. it was said (p. 524) that:

"The jurisdiction conferred upon the Secretary of Agriculture by the act of February 1, 1905; * * * is essentially a jurisdiction to care for, supervise, and manage the national forests as distinct instrumentalities of the Government—as 'going concerns'—and to execute certain laws relating to them."

And that (p. 525):

"The laws which the Secretary [of Agriculture] is to execute are manifestly the laws which declare the general policy respecting forest reservations and govern their administration and use as such apart from the general mass of public lands."

Without attempting to review those laws in detail, as they were when the act now under consideration was passed, it seems enough for present purposes to observe that, while they cast upon the Secretary of Agriculture the *duty of protecting and fostering the forests and empowered him to regulate their use and occupation* and to sell and in other ways dispose of the timber, they did not authorize through his action the granting or conveying of any estate or interest affecting the title to the lands themselves. * * * 29 Op. Atty. Gen. 305, 306; (Italics added).

The responsibility for the administration of the use and occupancy of lands within the national forests is clearly vested in the Department of agriculture. When lands within the national forests are not valuable for their mineral deposits, the Forest Service is entitled to the free and unrestricted possession and control of the lands and the timber growing thereon in order to properly administer the lands as the law directs. The problem of how or when to deal with mining claims in the national forests, which are not based on a sufficient discovery of mineral, that interfere with the governmental right of proper administration of the lands involves one aspect of the administration of the occupancy of the lands which is expressly the responsibility of the Department of Agriculture. If that Department determines that it has an administrative need to ascertain its right to certain lands upon which mining claims are located, then it is entitled to have this right determined, and that duty devolves upon this Department. *H. H. Yard et al., supra*, at 66, 67; Memorandum of Understanding, *supra*.

The Forest Service considers Bergdal to be an "occupancy problem." As a matter of Forest Service policy, in these circumstances it recommended that a proceeding be brought to determine the validity of the claim. (Tr. 5.) Once the Forest Service recommends the initiation of a contest to determine the validity of a mining claim, upon determining that the elements of a contest are present, it is not the function of this Department to inquire into the reasons or the justifications for the initiation of such a proceeding.

Contrary to the contentions set forth in Bergdal's answer, and in

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spite of the equitable nature of his plea, in view of the foregoing this Department is without authority to question, as a matter of its own policy, the manner in which the Department of Agriculture administers the national forests. Thus, we find that the Office of Appeals and Hearings is without authority to question the methods by which the Forest Service deals with mining claimants in the national forests and has no authority to change the nature of the proceeding from one recommended by the Forest Service to one it believes the Forest Service is justified in initiating. Since the decisions below found that the evidence sustains a conclusion that no discovery within the meaning of the mining laws has been made within the limits of the contested claim, the "H" lode mining claim was properly found to be null and void.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is set aside and the hearing examiner's decision is affirmed.

EDWARD WEINBERG,
Deputy Solicitor.

APPEAL OF VITRO CORPORATION OF AMERICA

IBCA-376

Decided August 24, 1967

**Contracts: Construction and Operation: Changed Conditions—Contracts:
Disputes and Remedies: Burden of Proof**

Under a contract requiring *inter alia*, excavation in canyons in the Rocky Mountain area of Western Colorado and installation of steel siphon pipes and other structures for an irrigation canal project, where the contract, the logs of borings and other Government data provided only general information concerning subsurface conditions that might be encountered, and then only as to areas outside of and not as deep as the required excavations in most of the canyon areas, the Board found that such information could not reasonably have been viewed as representations respecting the quantities or percentages of cobbles and boulders that would be encountered in such excavations in the consideration of a first category changed conditions claim. Where excavations were required for structures along the canal, the conditions encountered did not differ significantly from those shown on the applicable logs.

**Contracts: Construction and Operation: Changed Conditions—Contracts:
Disputes and Remedies: Burden of Proof**

Where a construction contractor assigned several employees to make a pre-bid site investigation that extended over several days, and those employees in a careful examination of the project area would have seen that there were many basalt cobbles and boulders at numerous points on or near the canal alignment, the contractor must be charged with the duty of obtaining rudimentary knowledge concerning the geologic origin of such

cobbles and boulders and how they came to be mixed in with non-basaltic materials, and about the proportions of cobbles and boulders that might be encountered along the benches and in the canyons where work on the canal was to proceed. The failure to secure information about the origin of materials in certain of the canyons was held by the Board not to be justified in the circumstances of the case; hence, there was a failure of proof of second category changed conditions. Except for a portion of one siphon site, "unanticipated" (second category) changed conditions were found not to have been encountered on the project because the percentages of cobbles and boulders were not shown to have been unusually high, or materially different from those ordinarily found in the area in work of the kind required under the contract, and because most of the appellant's difficulties arose from its own inefficient or unskilled construction methods.

Contracts: Construction and Operation: Changes and Extras—Contracts: Formation and Validity: Implied and Constructive Contracts

Directions by the contracting officer for the use of alternative construction practices or procedures that were specifically provided for in the contract did not constitute a constructive change. At the time the work was performed the contractor accepted such practices or procedures without contending that excess costs would be involved. The Board concluded that this indicated that utilization of the alternatives to meet conditions encountered on a canal project more than fifteen miles in length over ridges, benches, canyons and other varying features of the terrain was a matter that had been expected by both parties, rather than work of a different character than that required by the original terms of the contract.

BOARD OF CONTRACT APPEALS

Vitro Corporation of America (formerly Vitro Engineering Company), has taken this appeal, which concerns a construction contract that was performed by its Treco Division (in this opinion the appellant will be referred to as Treco). The work performed by Treco was construction and completion of earthwork and structures for part of the Bureau of Reclamation's Southside Canal. The project site is near Collbran, Colorado.

The claims denied by the Bureau's contracting officer¹ were asserted under Clauses 3 and 4 of Standard Form 23A (March 1953 edition). Because Treco's counsel have relied almost entirely upon Clause 4, "Changed Conditions," in presenting its claims, the major portion of this opinion will be directed to the question of whether or not changed conditions were encountered.

The contract was awarded in the estimated amount of \$1,598,349.18, and was prepared on standard construction contract forms. The work to be performed was set forth in Schedule 1 and Schedule 4 of Specifications No. DC-5155. Schedule 1 covered canal earthwork and

¹ The Decision and Findings of Fact from which the appeal was taken is dated February 21, 1963.

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structures, Station 18+95.46 to Station 1146+49. Schedule 4 covered the construction of siphon structures, utilizing steel pipe barrels.

Bids on the project were received on March 17, 1959. The Abstract of Bids² shows that Treco's bid was more than \$250,000 below the Government's estimate. The alternative bids of the next low bidder ran from approximately \$376,000 to approximately \$400,000 higher than Treco's bid.

The Claims

The appellant seeks additional compensation in the amount of \$880,139. The parties have stipulated that the Board's present consideration of the matter should be restricted to the question of entitlement. If it is determined that the contracting officer erred in finding that "the quantities measured for payment were strictly in accordance with the terms of the contract and that the conditions actually encountered did not differ materially from those indicated in the contract, nor were they materially different from those ordinarily encountered and generally recognized as inhering in work of the character required in the contract,"³ the parties are to be given an opportunity to negotiate with respect to an equitable adjustment.

During the summer and fall of 1959, Treco performed some construction work at six siphon sites and elsewhere on the project. Officials from the appellant's home office informed the Government's construction engineer in October 1959, that "they were facing a situation in which they were going to lose quite a little bit of money."⁴ At that time they attributed Treco's problems on the project to the inexperience of supervisors and under-estimation of the work.⁵ The fact that the appellant was encountering a bouldery condition in performing excavation work on the project was discussed frequently, but such discussions were "not in the light of claim language."⁶

After performing work with its own forces during the 1959 construction season, Treco subcontracted a great deal of the work that

² Exhibit No. 11.

³ Article 4, Changed Conditions, states in part:

"The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; provided that the Contracting Officer may, if he determines the facts so justify, consider and adjust any such claim asserted before the date of final settlement of the contract."

⁴ Tr. 334.

⁵ Tr. 335.

⁶ Tr. 498.

remained for completion. In a letter dated April 4, 1960,⁷ the vice president of Treco's parent company (Vitro) referred to a February 16, 1960 meeting with officials of the Department of the Interior at which company representatives had outlined "underlying reasons why our losses on this work will be nearly \$1,000,000."⁸ The letter referred to estimates of the Bureau of Reclamation, contending that they were "grossly inadequate," and asserted that actual quantities greatly exceeded the estimates because of Bureau errors in establishing terrain contours and the Bureau's erroneous advice as to soil types. The allegation in the April 1960 letter, concerning soil types seems to be the earliest in the appeal record to link the soil-type information with provisions of the contract dealing with quantities and payments. The letter advised that a claim would be made and stated in part:

Obviously, the soil composition causes excavations to extend beyond pay lines where they are predicted to be free standing, but in reality cave back beyond the limits. *Large boulders have the same effect.* Likewise backfill, compaction, rip-rap, sand and gravel bedding, gravel production and gravel blanket quantities are directly increased with an increase in excavating requirements. In many instances, concrete quantities themselves are increased as a consequence of these conditions. (Italics added.)

The underlined sentence in the above-quoted paragraph sounded the keynote of the claims that we are now considering.

In a letter dated July 7, 1960,⁹ addressed to the Solicitor of the Department of the Interior, the appellant provided "underlying reasons for our heavy losses, which can now be stated, of course, in more specific detail." The letter advised that Treco had specialized for many years in designing, engineering and constructing catalytic cracking facilities, and nearly every other type of refining facility. Treco's expansion into the field of constructing irrigation facilities was explained as follows:

In 1958, when the business of providing specialized facilities for the petroleum industry suffered a serious recession, TRECO decided to keep its organization intact by attempting to find sustaining business outside the division's established field. Bidding on the Collbran project represented a conscientious effort along this line.

Unfortunately, in going outside its established field, TRECO fell into the pitfalls which await the uninitiated; and substantially for that reason, TRECO bid the Collbran work far too low. * * *

The July 7 letter also refers to discussions between representatives of Treco and officials of the Bureau of Reclamation that took place

⁷ Exhibit 15a. This letter was written to the Solicitor of the Department of the Interior.

⁸ This was an estimate of loss associated not only with The Southside Canal project (the subject of this appeal) but also with another large construction contract that Treco had undertaken for the Bureau of Reclamation.

⁹ Exhibit 15b.

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"as soon as it became apparent to Treco that the work had been grossly underbid," and expressed surprise about the Bureau's policy "with respect to apparent mistakes in bidding." It then (p. 4) returned to the matter of claimed "serious overruns of quantities due to [the Government's] inadequate initial estimates," and gave examples of such overrun quantities, including some examples from the Southside Canal project. A description was given of the planning and scheduling difficulties that are encountered when unanticipated quantity increases are necessary for project completion. Other matters that were said to justify the payment of additional compensation were listed in the July 7 letter. The most significant item from the standpoint of this appeal is on page 7 of the letter, as follows:

Inadequate Bureau Drill Log Data

TRECO has encountered large rock in the siphon excavations in Park Creek, Leon Creek, Big Creek and Cottonwood Creek siphons. This rock excavation was costly, and also required over-excavation, making it necessary to use two and three times the amount of compacted backfill and other backfill for which there was no pay, in the over-excavation areas. In general, the entire Southside Canal project lacked pertinent drill log data along the sites of construction to enable anyone to estimate with even a slight degree of accuracy the probable cost of construction.

Eventually the appellant submitted two letters setting forth its claims in detail. The first is dated December 27, 1961, and the second July 24, 1962.¹⁰ The second letter advises that Claim Item I is for an equitable adjustment (monetary) in connection with the performance of Contract Item Nos. 5, 11 and 12 (excavation, backfill, and compaction of backfill at structures on the project, excluding siphon structures and a designated bench flume, wasteway and turnouts structure), and Contract Item Nos. 157, 158 and 159 (excavation, backfill and compaction of backfill at the siphon structures and the designated bench flume, wasteway and turnouts structure).

Claim Item II seeks a monetary equitable adjustment related to the same contract items as Claim Item I plus Contract Item No. 166 (furnishing and installing steel pipe siphons). Claim I relates to work performed *outside* of the excavation pay lines established in the contract. Claim II is for asserted increased expense incurred in performing work *within* the pay lines.

Appellant's Stated Claim Theories

Treco contends that it encountered changed conditions including "boulders, rubbles, clusters of boulders and non-free-standing materials which conditions were both materially different from those indicated

¹⁰ Copies of the claim letters are attached to the contracting officer's findings dated February 21, 1963 (Exhibit No. 5).

in the Contract and of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the Contract.”¹¹ Thus both first category and second category changed conditions are claimed to have been found on the project. It is asserted that the material encountered required excavation that extended considerably beyond the pay lines prescribed by the contract. Difficulties within the pay lines also are said to have been due to the large boulders and clusters of boulders and cobbles that had to be taken out in the course of excavation. Treco’s position is that contract drawings showing typical cross sections for trenches and contract provisions pertaining to the excavation work are representations that the subsoil in the trench excavation areas will be free-standing, and that excavation for structures can be performed within the prescribed pay lines.

A great deal of excavation work outside of the pay lines was performed; in addition, many boulders, cobbles and rubbles were encountered in the excavation for trenches and at structure sites. However, the contracting officer found¹² “that the logs of exploration included in the contract have been accurately reported and adequately show the conditions that were actually encountered and which form the basis for the claim. Also, * * * that the paragraphs of the specifications and the pertinent drawings, together with the information regarding the general geology and topography of the area which should have been gained in a reasonable pre-bid investigation of the site contain sufficient information so that the contractor, when preparing his bid, should have been aware of the conditions which were later encountered.”

Provisions Applicable to the Treco Claims; Stipulations

The following contract provisions are of importance in this appeal:

32. *Records of subsurface investigations.* The drawings included in these specifications show the available records of subsurface investigations for the work covered by these specifications. The Government does not represent that the available records show completely the existing conditions and does not guarantee any interpretation of these records or the correctness of any information shown on the drawings relative to geological conditions. Bidders and the contractor must assume all responsibility for deductions and conclusions which may be made as to the nature of the materials to be excavated, the difficulties of making and maintaining the required excavations, and of doing other work affected by the geology at the site of the work.

Paragraph 38 (quoted in part):

38. *Classification of excavation.* Materials excavated will not be classified for payment. Except as otherwise provided in these specifications, materials exca-

¹¹ Page 5, Appellant’s Post-Hearing Brief. As has been mentioned the appellant also states that it relies upon Clause 3, Changes.

¹² Paragraph 14, page 8, Findings of Fact dated February 21, 1963 (Exhibit No. 5).

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vated will be measured in excavation, to the lines shown on the drawings or as provided in these specifications, and all materials so required to be excavated will be paid for at the unit prices per cubic yard bid in the schedule for excavation. * * * Bidders and the contractor must assume all responsibility for deductions and conclusions as to the nature of the materials to be excavated and the difficulties of making and maintaining the required excavations.

Paragraph 41 (quoted in part) :

41. *Excavation for structures.* (a) Measurement for payment.—Excavation for structures will be measured for payment to excavation pay lines shown on the drawings, or if not shown on the drawings to pay lines, in accordance with the provisions of this paragraph. Regardless of quantities excavated, measurement for payment will be made to the prescribed pay lines: *Provided*, That for purposes of safety or other practicable reasons in connection with individual structures the Government reserves the right to require the contractor to excavate to the prescribed pay lines.

(b) Foundations for structures.—Excavation for the foundations of structures shall be to the elevations shown on the drawings or established by the contracting officer. Where concrete, precast-concrete pipe, or steel pipe is shown on the drawings or directed to be placed upon or against compacted backfill in rock excavation, the excavation shall be sufficient to provide for the minimum thickness of 6 inches of compacted backfill between rock points and the concrete or pipe, and measurement of excavation will be made to lines parallel to and 10 inches below the underside of the concrete or pipe.

* * * Any and all excess excavation or overexcavation performed by the contractor for any purpose or reason except for additional excavation as may be prescribed by the contracting officer, and whether or not due to the fault of the contractor, shall be at the expense of the contractor. Fill and compacting of fill for such excess excavation or overexcavation shall be at the expense of the contractor.

Where additional excavation is prescribed by the contracting officer to remove material unsuitable for the structure foundation, measurement and payment of the excavation will be made to the prescribed depths and dimensions. Payment for the backfill and compacted backfill required by the additional excavation will be made as provided in Paragraphs 48 and 49.

Paragraph 49(d) (quoted in part) :

* * * Measurement, for payment, of compacting backfill about structures will be made only for the quantities actually compacted within the limits of the established pay lines for backfill about structures and the compacting of refill outside of excavation pay lines shall be performed at the expense of the contractor.

Although the contract does not contain a requirement for a site investigation, two Treco representatives made an inspection of the Southside Canal site on March 14, 1959.¹³ They were accompanied on their inspection visit by an employee of the Bureau of Reclamation.

¹³ The facts with respect to the Treco site investigation are contained in a stipulation that was filed with the Board on October 3, 1966. The Board has added that stipulation to the appeal file.

Part of the trip was made by pick-up truck and part by a four-wheel drive vehicle. Since the Southside Canal is in mountainous country at altitudes in the order of seven and eight thousand feet, the construction site was covered with snow of varying depths in late winter when the Treco inspection was made. This required use of a route along country and farm roads near the canal site—travel was not possible immediately adjacent to the areas where the canal trench was to be excavated. It was possible, however, to proceed by vehicle to each of the siphon sites. Some of the siphon sites (including Salt Creek, Big Creek and Cottonwood Creek, where major siphons were installed) were visited. Most of the remainder of the right-of-way was accessible only on foot, although some of it could be seen at a distance, from the country and farm roads. Representatives of the appellant also viewed the site from a private plane on March 14, 1959 (the same day they made the inspection by vehicle and on foot). Two days later the site was viewed twice from a plane by two Treco representatives, but little other than snow could be observed.

The writer of this opinion, in addition to conducting the hearing on the appeal, viewed almost all of the project, including the siphons and many of the minor structures, in early October 1965, on a day when the weather was good and all features of the completed canal and of the adjacent terrain were easily observed. The hearing was held in the latter part of the following April.

A second stipulation filed by the parties after the hearing on this appeal was received by the Board on July 25, 1966.¹⁴ That stipulation affects the computation of costs that had been submitted by Treco to the contracting officer, because it withdraws from consideration in the appeal "any claim in connection with those portions of Item 157 work (Excavation) which were performed by Appellant's subcontractor, Brasier Bros. Construction Co. at the Big Creek, Cottonwood Creek and Salt Creek siphon structures." The withdrawal has no effect on the claim as it relates to Item 158 (Backfill) and 159 (Compaction) at those structures.

Treco's excavation work during the first construction season (1959) included removal of material in making trenches at several of the major siphon sites. Leon Creek, Park Creek and part of Salt Creek were among the siphon sites excavated during that period.¹⁵ The Government counsel has stressed this fact in connection with the transaction that Treco arranged in mid-October 1959, with Brasier Bros. Construction Co., a Colorado contractor, for excavation by Brasier Bros. under a subcontract of siphon trenches at Big Creek, Cotton-

¹⁴ This stipulation also has been added to the appeal file.

¹⁵ Tr. 154.

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wood Creek and Salt Creek for a price per cubic yard¹⁶ that was 45¢ less than the \$2.20 bid by Treco for such work—the subcontractor excavated those trenches and handled the boulders and cobbles that were encountered apparently without protesting or making a claim.¹⁷ The Government's construction engineer for the Collbran Project testified¹⁸ that "Mr. Brasier * * * seemed to relish that type of operation," and that the subcontractor "seemed to have the ability to move rock a little better." The construction engineer's assertion¹⁹ that the subcontractor could excavate a narrower trench in bouldery conditions is borne out by Exhibit AA, which shows that the excavation by Brasier Bros. at the Cottonwood and Big Creek siphon sites ran 20.86 percent and 41.52 percent respectively, over the Bureau's estimated pay quantities, while Treco's excavation at the Grove Creek, Park Creek and Leon Creek siphon sites produced excavation overruns of 88.71 percent, 61.77 percent and 46.87 percent, respectively. A former employee of Treco testified that there was a higher percentage of rock at the Big Creek siphon site than at Grove, Park or Leon,²⁰ and upon concluding his testimony with respect to the Big Creek siphon site, continued with a description of the subsoil at Cottonwood Creek, stating that it was the "same thing, an accumulation of rock in the form of nests or clusters."²¹

Evidence and Contract Provisions Relied Upon by Treco

One of the appellant's two witnesses at the hearing had been assigned in May of 1959, to work at the Southside Canal project. His duties were to prepare reports, communicate with the appellant's top management, handle matters involving Treco-Bureau liaison, and expedite materials.²² Although he carried the title "Project Manager" at least part of the time when work was being performed on the project, no showing was made respecting construction experience on his part prior to the Southside Canal project. He did not participate in the appellant's pre-bid work,²³ bear responsibility for the actual prosecution of the work, or supervise laborers.²⁴ It was conceded by the appellant's counsel that this employee (who will be referred to herein as Treco's manager) was not an expert on rock excavation.²⁵

¹⁶ Exhibit 18.

¹⁷ Tr. 411.

¹⁸ Tr. 350.

¹⁹ Tr. 411.

²⁰ Tr. 105, 45, 61, 71.

²¹ Tr. 112.

²² Tr. 27.

²³ Tr. 202.

²⁴ Tr. 423.

²⁵ Tr. 129.

No evidence was submitted as to the assumptions concerning soil conditions that actually were made by Treco personnel when the bid was prepared. The Board also was not advised whether the appellant in fact consulted a geologist or soils engineer prior to the time that its proposal was submitted. Appellant's counsel asserts that the appellant should not be charged with the obligation to have obtained a geologist's pre-bid review, and observes in its Post-Hearing Reply Brief that, as to the items involved in the claims, the appellant bid higher unit prices than those submitted for the same items by several of the bidders who submitted much higher over-all bids on the project. For example, Treco's bid of \$2.20 per cubic yard for siphon structure excavation (Item No. 157, Schedule 4) was higher than the ones for that item listed by the two bidders whose over-all quotations for Schedule 4 were the closest to Treco's low bid—those bidders quoted \$2 and \$1.70 for Item No. 157. Because appellant's counsel has made the unit price comparisons without suggesting that the appellant's unit prices for work that was performed at a relatively early time in the contract performance period contained any elements attributable to unbalancing, the Board in considering this appeal is viewing such unit prices as realistically arrived at (not unbalanced).

At the hearing and in post-hearing briefs the parties spent the greatest part of their time and effort on the claims which concern excavation and construction work at sites where siphon structures were installed—Park Creek, Leon Creek, Salt Creek, Grove Creek, Oak Creek, Little Creek, Big Creek and Cottonwood Creek. Treco's manager testified as to the conditions that were encountered at each of those creeks:

For the longer and deeper siphon sites he gave very high estimates of the percentage of rock excavation that was found to be necessary (the Government disputes the accuracy of most of these estimates). His estimate for Park Creek was a "good 80 percent,"²⁶ for Leon Creek "a good 85 percent,"²⁷ for Salt Creek "in the order of 75 percent,"²⁸ for Big Creek "95 percent,"²⁹ and after he gave his account of conditions at Big Creek he stated that the subsoil condition at Cottonwood Creek was the "same thing, accumulation of rock in the form of nests or clusters." His recollection was that the rock excavation percentages did not run in such high ranges at the shorter siphons.³⁰

Treco's manager identified and discussed to some extent certain sketches (including representations of measured sections drawn to scale) that were prepared by the appellant's field engineer, who died

²⁶ Tr. 45.

²⁷ Tr. 61.

²⁸ Tr. 66.

²⁹ Tr. 105.

³⁰ Oak Creek, "about 20% rock excavation" (Tr. 90), Grove Creek, "about 40% rock" (Tr. 71), Little Creek, "Boulders were not so bad." (Tr. 97).

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in 1963, after the project was completed, but prior to the hearing on the Treco claims. Such sketches in the appeal record are Exhibit R, which was drawn in 1961, and is related to the siphon at Park Creek (excavated in 1959 and backfilled in 1959 or 1960); Exhibit S, which depicts a measured section of trench at Park Creek and "schematic or illustrative"³¹ boulders, but also was drawn after completion of the work at Park Creek; Exhibit W, which shows a measured section and illustrative boulders at Leon Creek, the measurements having been taken in mid-September 1959, while the trench was open, the exhibit probably having been drawn almost a year later in the summer of 1960;³² Exhibit BB, "done sometime in 1960,"³³ to show similar conditions of over-excavation at Grove, Oak and Little Creeks; and Exhibit LL, a sketch drawn by the field engineer to illustrate boulder conditions encountered in the Big Creek siphon and Cottonwood Creek siphon excavations.³⁴

Treco's manager told of running into large boulders once the first four or five feet of material had been removed in trenching work at most of the major siphons (Park, Leon, Salt,³⁵ Grove, Big, and Cottonwood), and asserted that clusters of boulders and cobbles were found throughout the entire length of those siphons. He contended that over-excavation both at the sides and along the bottom of each of those siphons was unavoidable because boulders protruded from points within to those beyond pay lines. He also provided information as to the number of pounds of explosives that were used at several of the longest siphons, and gave the size of the largest boulders that were blasted (up to 4' x 5' x 8' at Park and up to 4' x 5' x 10' at Leon). His testimony concerning the Grove, Oak and Little Creek siphon sites covered a wider field of problems—boulders at Grove and Oak, sloughing materials at Oak and Little, and difficulties with water at Little. He also made brief and general statements about excessive numbers of boulders at many of the minor structures.

The appellant contends that typical trench sections for steel pipe siphons that are shown on Contract Drawing No. 74 (482-D-192) "depict the subsoil at the trench excavation to be free standing." The lines that indicate the sides of the trenches are labeled "Excavation pay lines," and are not drawn to show any possible over-excavation or sloughing that may have been expected.³⁶

³¹ Tr. 40.

³² Tr. 53.

³³ Tr. 72.

³⁴ Tr. 109. The record does not disclose when Exhibit LL was prepared; however, it appears to be similar to the sketches that were drawn in August 1960.

³⁵ Some ledge rock was also found at the Salt Creek siphon site.

³⁶ A specific instruction given on Drawing No. 74 for each of the three types of siphon trench shown thereon requires the contractor "in rock and where directed [to] excavate below bottom of pipe and [to] place compacted bedding of 6" min. thickness."

In support of its claims the appellant also points to that portion of Paragraph 41(a) of the specifications which allows the Government, for purposes of safety or other practicable reasons in connection with individual structures, to require the contractor to excavate to the prescribed pay lines. Treco's counsel state that this language indicated to bidders the Government's anticipation that the excavation for structures "can be performed within the prescribed pay lines but that the Government reserves the right to require the Contractor to excavate to prescribed pay lines" for the designated purposes.

Daily Reports; Change Orders

The appellant added to the appeal record several sets of daily reports, including four daily progress reports turned in by a Treco employee,³⁷ and a summary of the Treco daily progress reports for a four-month period (July 24–November 24, 1959).³⁸ There are references to the rock and boulder situation on about twenty days of the total number covered by those reports and the summary. They run from statements that reveal very little about the severity of the rock condition, such as "Blasting and Excavating at Leon,"³⁹ to those that give a good idea of the problems of the day. An example of the latter type of entry is "Exc. Park Creek. 200 yds. Mostly rock. Also drilling and blasting rock. * * *".⁴⁰ Since Treco had pending neither (i) a request for a time extension nor (ii) a claim made under the Changed Conditions or Changes clauses (and related to rock), during any part of 1959, the Treco progress reports were not written with an eye to recovery standards established in Standard Form 23A. This is the conclusion that must be drawn also as to most of the progress report and diary entries that were made by Government employees, and added to the appeal record as appellant's exhibits⁴¹ during the hearing.

The Bureau's Principal Inspector for Earthwork reported in his Monthly Progress Report covering July 1959,⁴² that the construction of the canal was moving at a "slower rate than contractor had anticipated," and assigned as the reason for the slow progress "the excessive amount of cobbles and boulders that are encountered during excavation." The canal excavation, however, was being performed by a subcontractor for Treco, on whose behalf no claim has been submitted. Excavation work by Treco's forces was not proceeding in July 1959,

³⁷ Exhibits Z-1 through Z-4.

³⁸ Exhibit RR.

³⁹ Entry for October 22, 1959, Exhibit RR.

⁴⁰ Entry for September 10, 1959, Exhibit RR.

⁴¹ Exhibits A through H, Exhibit N, and Exhibits I-1 through I-12. Most of those introduced are daily reports. A few monthly reports applicable to some of the longer siphons are included.

⁴² Exhibit N.

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at the sites of the longer siphons where the heaviest rock concentrations are claimed to have existed. In that month some excavation work for the siphons at Grove Creek and Little Creek was accomplished. Treco's manager acknowledged that boulders "were not so bad" at Little Creek, and gave one of his lowest estimates (40 percent rock) for Grove Creek. There is a possibility that his observations related not only to the subcontractor's canal excavation but also to some of Treco's culvert work, but a countering circumstance is that no complaint or statement concerning difficulty with rock either in siphon or culvert excavation is to be found in the appellant's daily progress report summary covering July and August 1959.⁴³

Most of the Government inspector's reports that were introduced cover 1959 happenings. The 1960 reports in the appeal record relate principally to work at the Big Creek and Cottonwood siphons and to some of the minor structures, particularly culverts. In early September 1959, a couple of broad observations about excavation activities were recorded. Thus on September 2, 1959, it was written that at Park Creek basalt boulders were "making [siphon trench] excavation extremely difficult," and a September 9 diary entry states that "Leon Creek siphon excavation is very rocky."

When Treco began to encounter rocks and boulders in project work, but advanced no claims, the inspector's reports naturally zeroed in on the orders that they issued under the specifications. The inspector's diaries show that at the siphon sites (excluding Little Creek) and at many of the minor structures a portion of Section 41(b) of the specifications was called into play. This portion provides:

Where concrete, precast concrete pipe, or steel pipe [used by Treco] is shown on the drawings or directed to be placed upon or against compacted backfill in rock excavation, the excavation shall be sufficient to provide for a minimum thickness of six inches of compacted backfill between rock points and the * * * pipe, and measurement of excavation will be made to lines parallel to and 10 inches below the underside of the * * * pipe.

Where rocks and boulders were found, the inspector gave "verbal notice"⁴⁴ that the excavation should be carried six inches below the elevation shown on the drawings, and included the resulting additional quantity of excavation with the quantities that were to be paid for at the specified unit price. The requested over-excavation and placement of a 6" refill cushion occurred only in the bottoms of the excavations for siphons and for minor structures. Instructions to over-excavate along the sides were not given—such over-excavation was performed, but that is a matter to be considered later in this opinion.

⁴³ Exhibit RR, pages 1-4.

⁴⁴ Tr. 413.

With regard to obtaining a proper 6" bedding of select materials under the steel siphon pipe the reports of the inspectors show that they were guided by two requirements. First, rocks larger than 1½" could not be permitted closer than 3" from the pipe. Second, rocks in the select material larger than 3" in diameter were objectionable. Against that backdrop the references in diaries of the Government inspectors to "large" rock or boulders, and "excessive amount" of cobbles and boulders within the lines established for excavation, or to the need to prevent rock damage to the steel siphon pipe cannot be regarded as furnishing support to Treco's claims.

The 6" bedding was placed under the pipes pursuant to Section 41(b) at each of the siphon sites other than Little Creek. The over-excavation and refill to guard against rock points extended for the full length of the siphon pipes at Park Creek, Leon Creek, Grove Creek, Big Creek and Cottonwood Creek, and for substantial distances under the pipes at Oak Creek and Salt Creek. At most of the minor structure sites it was not necessary to invoke Section 41(b) to obtain a cushion of select material. This was because at more than one-half of the minor structure sites, rocks and boulders were not encountered; in addition, at many of the remaining minor structures there were not enough rocks and boulders to pose a serious problem even though some were turned up in the excavation work.⁴⁵

A definite price for overhaul of material was not established originally in the contract. Shortly after the appellant began its work on the Canal, an agreement between the Government and the appellant was reached which set a price of three cents per station cubic yard for hauling excavated material. The negotiated arrangement was applicable to hauls in excess of 1,000 feet, for an estimated quantity of 125,000 station cubic yards and seems to have been handled as a routine matter, since it was covered as one of four items in Order for Changes No. 1, dated June 25, 1959 (Exhibit 2-a).⁴⁶

Order for Changes No. 2 (Exhibit 2-b) provides for additional payment for a changed condition that apparently was called to the attention of the contracting officer in timely fashion. The Government acknowledged in Order No. 2 that a swampy or boggy area through which a portion of the trench for the Salt Creek siphon was excavated contained materials which increased certain unit costs. The excavation work in that area was performed in the spring of 1960 and the order granting the adjustment under Clause 4 is dated June 24, 1960.

⁴⁵ A stipulation that was read into the record (Tr. 504-513) discloses that over-excavation because of rocks and boulders was required at less than 25 minor structure sites. In all, there were approximately 150 minor structure sites.

⁴⁶ Paragraph 48 of the contract's Special Conditions provides that if backfill material is not available within 1,000 feet of any point on a structure additional haul will be ordered in accordance with Clause 7 of the General Provisions.

*August 24, 1967**Treco's View of the Worksite; Exploration Logs*

The appeal record does not contain testimony from any of the Treco employees who made the pre-bid site investigation on its behalf. Government employees who were assigned to the project at the time the Treco investigation was made (mid-March 1959) drew upon their records and memories to outline what would have been observed at that time. Between March 1 and March 17, 1959, the Government's Construction Engineer (authorized representative of the contracting officer) looked at all of the major structure sites and other features of the canal on five or six trips, spending a total of 12 to 14 hours in this activity.⁴⁷ He was impressed by the remoteness and ruggedness of the terrain at the siphon sites, the fact that at those sites a contractor would be dealing with steep slopes and high heads, and that "the rocky nature of the soil * * * was in evidence almost everywhere as far as the siphons were concerned."⁴⁸ He recalled that although there were "patches of snow" of variable depths at Big Creek, the swiftly flowing water in that stream was cascading over rock in its bed; in addition he testified that "over on the left side of the slope where the [Big Creek] siphon was to go there were exposed cuts with just a profusion of rock right in them sticking out."⁴⁹ Leon Creek and Park Creek, he stated, were covered with more snow, although there was rock to be seen near the Leon Creek site three or four hundred feet downstream. According to another Government employee, the Chief Inspector on the Treco project, several very rocky areas were visible at the time of the Treco site view, either from the Salt Creek siphon alignment, or from a county road near the Salt Creek siphon.⁵⁰

The Construction Engineer also gave a description of the boulders and rocks that can be seen in the road and highway cuts in the Southside Canal vicinity—they run, he testified from 4–6 inches to "maybe as high as 2 feet" in diameter.⁵¹ He told of a big "stockpile of rock" that had resulted from the "separation operations" of a contractor who was building a dam less than one-half mile from the end of the canal.⁵² Presumably the activities of that contractor were observed by the appellant's representatives who made the airplane inspections of the Southside Canal site. Grove Creek, he stated, had less snow and could have been reached by a road that was plowed out and open to allow the viewing of "a great big pasture of boulders" that was downstream from the Grove Creek outlet, and "evidence at the bottom of the

⁴⁷ Tr. 325.

⁴⁸ Tr. 325.

⁴⁹ Tr. 326.

⁵⁰ Tr. 299, 305, 317.

⁵¹ Tr. 328.

⁵² Tr. 330.

creek of being completely covered with boulders.”⁵³ At Cottonwood Creek, according to the Construction Engineer, there were two existing ditches with rocks sticking out of cut slopes, and rock in the bottom of the creek.⁵⁴ He was not surprised that at some of the siphon sites the appellant encountered many rocks and boulders.⁵⁵

Upon cross-examination, the Construction Engineer voiced his belief that Treco did not encounter a problem that was “any more than you’d normally expect” in keeping the siphon trench sides from sloughing.

As to the Government’s exploration logs the contracting officer, in his finding dated February 21, 1963, made the following statement:

The contractor has mentioned numerous times in his claim that rubbles or clusters of boulders were encountered within the excavation lines and that there was no indication of the presence of these clusters in any part of the contract. However, the contractor has not contended that rock or clusters were encountered at the actual location or depth of any test boring which showed another type of material. The logs of exploration made in connection with this contract are shown on specifications Drawings No. 482-D-107, -108, and -109 * * *.⁵⁶ These test borings do not constitute a representation by the Government that the subsurface conditions between successive borings will be the same as the conditions at locations of the borings; the only representation being that the physical conditions encountered in performing each boring are accurately reported.

The Government furnished 111 subsurface exploration logs for review by prospective bidders. The exploration work was accomplished with an eight-inch power auger, eight-inch and smaller hand augers (down to one-inch and two-inch), or by hand excavation (test pits and trenches). Boulders are referred to in 45 of the 111 logs. The references ranged from notes such as “A few SANDSTONE BOULDERS on surface” (AH 134) to more detailed accounts such as “SAND, silty with BASALT COBBLES and BOULDERS * * *. Note: Nine holes were tried before a depth of 3’ was reached because of the BASALT COBBLES and BOULDERS” (AP 175).

The exploration logs provided a great deal more information on what was to be expected in excavation work for minor structure sites and long reaches of the canal than they did for the siphon sites—the latter sites, where the major structures were constructed, were located along the sides and bottoms of canyons and creek bottoms. Thus, at the Park Creek siphon site the only information available from Government exploration work along the canyon area where the siphon pipe was to be installed came from one 3’ x 4’ hand excavated test pit (TP 105A) that was four feet deep. In the Leon Creek canyon no exploratory work was performed at any point where the siphon pipe was

⁵³ Tr. 348.

⁵⁴ Tr. 349.

⁵⁵ Tr. 405.

⁵⁶ The drawings are attached to the contract, bearing (upper right-hand corner) Nos. 35, 36, and 37.

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to be placed; however, a 1" hole six-feet deep (AH 110) was augered just above the point where the siphon pipe started on the inlet end. At Big Creek there are two trenches (TP 169A and 169B) and an auger hole (AP 170). The trenches were dug on the uppermost parts of the canyon walls, one on each side, near the siphon pipe end locations and auger hole AP 170 was drilled near trench TP 169B.

Cottonwood Creek, like Leon Creek, has no log shown within the canyon reach where the siphon pipe was buried, but has a trench (TP 203) just within the canyon and an auger hole (AP 202) on the bench several hundred feet from the rim.

The longest of the siphons was installed at Salt Creek. At that site more drilling had been performed, and there were five auger holes (AH 120 through AH 124) in the canyon on or near the center line for the pipe. In addition AP 125 was augered just beyond the end of the pipe on the outlet end.

The Grove, Oak and Little Creek siphons ran for distances that were relatively short (about 60 to 90 feet), with their principal portions located in the creek beds. Problems with cobbles and boulders were claimed to have arisen at Grove and Oak Creeks. Logs TP 145 and TP 146 are in the vicinity of the Grove Creek siphon, but are outside of the area traversed by the pipe. This also is the case for logs AP 154 and AP 155 at Oak Creek.

Except perhaps for Salt Creek, an analysis of all steel pipe siphon sites and the Government's exploration logs definitely bears out the correctness of the statements by Treco representatives:

1. The conditions encountered in the excavation of all the siphons were in many cases completely indeterminate because of the lack of test data * * *. (Exhibit P-3—September 21, 1960 letter written by Treco's Manager.)
2. In general, the entire Southside Canal project lacked pertinent drill log data along the sites of construction to enable anyone to estimate with even a slight degree of accuracy the probable cost of construction. (Appellant's letter to the Government dated July 7, 1960. Exhibit 15b.)

Other Areas of Disagreement; The Photographs

In several important areas the parties are in serious disagreement over what happened on the project. This is the case as to recollections of witnesses on the percentages of rocks and boulders that were encountered (except for one section of the Big Creek siphon). The Government contends also that Treco's forces produced pipe trenches that were much wider than necessary through the use of over-wide equipment, without paying sufficient heed to the fact that materials had to be placed back in the wide trenches. An associated matter in dispute is whether making the trenches wider was unavoidable because large boulders extended from without the pay lines into the area for which

excavation payment was authorized. The Government's position is that this could have happened, but that in most places it did not, since the appellant had embarked from the outset of its operations upon a "mode" of excavation that produced over-wide trenches.⁵⁷ At some locations the appellant experienced difficulty with conditions other than boulders and cobbles, such as water in the excavation, rock-free material that sloughed, and bedrock. No great attention was paid to these matters at the hearing or in the briefs of counsel. However, the Government's general stand as to some of those conditions is that they could not be viewed as unusual or unexpected, and as to others that they resulted from Treco's poor planning or work procedures.

The Government also has called to the Board's attention that at a pre-construction conference the Government's Construction Engineer remarked that the Southside Canal project was Treco's first job for the Bureau of Reclamation and that the attention of the Treco representatives who were present (including the Division Manager and Project Superintendent) was directed to the "portions of the specifications relating to changes in the work, changed conditions, work not included in the contract but inseparable from contract work * * *. The provisions covering protests, work considered by the contractor to be outside of the contract limits, were thoroughly discussed * * *." ⁵⁸

The Government does not agree with Treco's contention that the pay lines on drawings constituted a representation as to the quality or character of the material to be excavated. The Government asserts that they were theoretical only and could not reasonably be taken to indicate the conditions which might be encountered.

Agreement is lacking respecting the significance of the fact that in many instances it was necessary to obtain backfill material from sources other than the structure sites. The Government submits that "the contract clearly contemplated * * * that in some instances, backfill might have to be obtained from sources other than the structure excavation," looking to (1) Paragraph 48(a) of the specifications, which states that backfill for structures will be obtained from excavation for the structures insofar as practicable, but also advises that additional material shall be obtained from borrow pits when enough suitable material is not available from structure excavation or adjacent canal excavation, and (2) Paragraph 49(d), which provides for

⁵⁷ Exhibit AA provides support for the Government's assertion that the siphon trenches were over-excavated "from the start" due to the type of equipment brought into the job by Treco. Tr. 416-17. Exhibit AA shows that generally there was a *higher* percentage of over-excavation at siphon sites where the appellant claims there was a low rock content than at the sites where Treco's Manager said the cobble and boulder problem was the most severe.

⁵⁸ Attachment to Exhibit 15c.

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an overhaul payment when material cannot be obtained within 1,000 feet.

The appellant placed in evidence 27 photographs of different scenes on or near the Southside Canal. Some of them had been taken by Government employees, and some show work as it was being performed in the late summer of 1960 by the excavation subcontractor. Only eight or nine of the appellant's photo exhibits were taken during the 1959 construction season, when the appellant was performing the excavation work for siphons with its own forces (most of these pictures are of Leon Creek or Park Creek). Thus it does not appear that Treco was taking action during 1959 to substantiate a Changes or Changed Conditions claim. There are more than 90 Government photograph exhibits. Most of them are of various work phases at the siphon and minor structure sites. Very few of the entire group of photographs in the appeal record were taken for the specific purpose of advancing a claim or defending against one. Most of them were taken in 1959 or early 1960, when there was no pending Clause 4 claim. A picture by picture commentary would unduly lengthen this opinion; however, the photographic evidence has been reviewed thoroughly by the Board.

The Experts

An expert in the field of soil mechanics was the appellant's second witness. He had worked for ten years as a soils engineer and soils properties section head for the Bureau of Reclamation. After that, and for about nine years prior to the hearing on the Treco claims, he had been in a responsible position in a Denver consulting firm. His firm provides advice and designs in the fields of soil engineering, engineering geology and ground-water geology. He (as did the Government's expert who is an engineering geologist) viewed the site and considered the questions involved in this case for the first time several years after completion of the Southside Canal project.

Without doubt Treco's expert had very extensive and broad experience in his field. He supplied the following distinction between the work of a soils engineer and that of a geologist:

* * * the * * * engineering geologist has to do with the basic origin and deposition of materials with which we are involved. It is a generalized field which has the most importance in the preliminary and feasibility stages of planning for a project. When it gets to the point * * * that specific criteria have to be reached for design or structure foundations, for excavations, or where decisions have to be made as to what costs of construction are going to be, then it falls to the engineer and in underground specifically the soil engineer. * * * ⁵⁹

⁵⁹ Tr. 217.

An engineering geologist in the firm of the soils engineer who testified for Treco "initially had taken on the job," but the firm concluded that the assignment "was not in his field of capability," and it was transferred to the soils engineer.⁶⁰

Treco's expert testified that at the siphon sites Treco could have expected the percentages of boulders to be in a low range—as an example he gave an estimate of 20 percent for the Park Creek. He also said that "essentially a dirt excavation situation" should have been expected at Park Creek. In arriving at his conclusions he took into account the four logs of exploration that were at or near Park Creek, and Drawing 482-D-192, the typical section for the steel pipe siphons.

From his study of four test pits near the Leon Creek siphon site and other factors, Treco's expert advised that it would be improper to assume that boulders scattered along the surface of the ground in the vicinity of that stream would extend for the depth of the siphon pipe excavation. He would have expected the materials forming the trench sides to be of high plasticity and dry strength. His explanations of the source of these boulders is important in its relationship to the testimony of the Government's geologist, which will be reviewed later in this opinion. As to the boulders Treco's expert explained:

* * * They were basically transported along with the clays and sand by glacial and water action and then the subsequent stream has eroded away * * * great depths of materials and tended to leave the boulders along the stream in a rather prominent position and these boulders reflect the older content of the soil before it had been eroded of a considerable depth and frequency. * * *

The soils engineer gave the following information when he was asked how a condition of clusters of boulders was produced:

It could be one of several ways. *I probably should check with the geologist to find out how they were left here.* One is the stream eroding off the other materials leaving the boulders in concentrated locations and the stream moves to another location. Perhaps boulders rolling off the slope of a hill forming a talus slope, boulders are those segregated. * * *⁶² (Italics added.)

In the opinion of Treco's expert, the occurrence of clusters of boulders in the sides of the Park Creek and Leon Creek siphons was unusual.⁶³

In his discussion of the specifics of a proper pre-bid analysis for a project such as the Southside Canal the soils engineer set forth an approach that differs radically from what is required under the contentions of the Government and its expert. Treco's expert stated:

⁶⁰ Tr. 224.

⁶¹ Tr. 231.

⁶² Tr. 235.

⁶³ Tr. 236.

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* * * We would confine our analysis to primarily a study of the logs because * * * this is the information that the designer had to prepare his design and it is usually more reliable and detailed and better than what we could do ourselves in the way of extending this type of information.

The soils engineer provided opinions in support of the appellant's contentions that changed conditions were encountered at the siphon sites, citing the fact that a compacted six-inch thick backfill bedding had been placed under most of them, and stressing repeatedly that the conditions in the canyons and draws did not correspond to the nearest logs of exploration.⁶⁴

Upon cross-examination Treco's expert acknowledged that the boulders which can be seen in some of the road cuts near the Southside Canal project were basalt, and that the canal passes through Wasatch and Green River formations, which are relatively soft compared to basalt.⁶⁵ A geologist told him, he stated, that the basalt came from cap rock that originally had existed "farther to the south," on the Grand Mesa. After agreeing that the project area had been subjected to glacial action, the soils engineer, when asked whether glacial action ran down a stream channel, explained:

You are in an area of detailed geology that I don't know.⁶⁶

He did not agree that an inquiry into the question of possible glacial action down the stream channels was necessary. As to this he said:

* * * I would rely on the inspection of the materials that I could see exposed along the line and the logs of the test pit itself. It is by far more reliable and more detailed information. The trouble with glacial action is that the materials deposited by it cover the most extreme possible range of materials that could be deposited.⁶⁷

The projection of data for a considerable distance⁶⁸ by Treco's expert when he reviewed the information contained on some of the logs of exploration was said by him to be proper because "the lateral homogeneity will be reflected vertically." In his opinion one is "likely to find the same differences laterally or vertically or the same uniformity conversely except for the local influence of the stream itself."⁶⁹

⁶⁴ In addition to covering the boulder situation, Treco's expert made observations concerning sandstone that was encountered by Treco at Salt Creek. He also indicated that the conclusions he had reached concerning over-excavation at the siphon sites would apply to culvert structures.

⁶⁵ Tr. 274.

⁶⁶ Tr. 275.

⁶⁷ Tr. 276.

⁶⁸ At a siphon site such as Leon Creek he answered in the affirmative when asked whether he was "willing to project holes 1500 feet apart or so here down 300 feet and back up again."

⁶⁹ Tr. 281.

The engineering geologist who testified for the Government was a Bureau of Reclamation division chief who in the spring of 1966 had been with that agency for 21 years, and in addition had performed three years of private and consulting work. He had the requisite academic background for practice in his engineering specialty (as did the appellant's expert). His visit to the site was on March 5 and 6, 1964. His position was that the "geological aspect" of understanding and evaluating the physical properties of the soils at the Southside Canal project deserved more emphasis than Treco's expert placed upon it.⁷⁰ He stated that the physical characteristics of soil have a direct relationship to the parent material from which the soil under study was derived.

In addition to reviewing the specifications and viewing approximately 95 percent of the site the Government's expert reviewed available literature concerning the Grand Mesa to "see what geology had been discussed."⁷¹ On the basis of what he had learned he gave a description of the project's general topographic setting as follows:

* * * the Vega Dam and the Southside Canal are situated on the * * * north slope face of the Grand Mesa which is a spectacular topographic feature of this area, and the drainage into Plateau Creek * * * and the opposite side of Plateau Creek is the south facing slope of the battlement mesa.⁷²

* * * the area of Grand Mesa has everything to do with the materials encountered along the South Side Canal. The geology of this area is that you have a layer of basalt capped mesa which is underlain by the Green River formation which in turn is underlain by the Wasatch formation.⁷³

The engineering geologist gave an estimate of 300 to 500 feet for the average thickness of the basalt cap rock on the Mesa. The basalt boulders are of igneous origin, are fine-grained, black or dark gray, and contain gas holes. The Green River formation is of a thickness estimated at 1,500 feet, and is mostly made up of siltstone, sandstone and shales—they were deposited "as fresh water deposits during Tertiary times in geologic history."⁷⁴ The Wasatch formation, he advised, is about 2,000 feet thick in the Grand Mesa area and "consists of poorly consolidated sedimentary formations," "variegated with pastel colors."⁷⁵ He gave the location of the Southside Canal as "a short distance below the contact of the Green River and Wasatch formations. * * *"⁷⁶ The geologist continued:

⁷⁰ Tr. 356.

⁷¹ Tr. 358.

⁷² Tr. 359.

⁷³ Tr. 361.

⁷⁴ Tr. 364.

⁷⁵ Tr. 354 (this transcript page is incorrectly numbered, and should be 365).

⁷⁶ Tr. 355. (Should be Tr. 366.)

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[The glacial activity is] Manifested by the fact that you find various types of glacial debris in the form of lateral moraine material * * *, glacial outwash in all of the major streams.

* * * * *

Well, * * * in all of the road cuts that you examine, you will find that you have cut through these promontories of glacial material, you will find a great abundance of glacial boulders in this till. You have a very heterogeneous or mixed up deposition that is characteristic of glacial till, you have transportation of tremendous boulders all the way from the Grand Mesa to, down to Plateau Creek traversing the South Space Side Canal area * * *.⁷⁷

Glacial tongues from the covering of ice on the Grand Mesa extended down the major tributaries that flowed in a northerly direction from the Mesa into Plateau Creek—among the streams that were affected by the action of glacial tongues were Park Creek, Leon Creek, Big Creek, Cottonwood Creek and part of Salt Creek.⁷⁸ The testimony of the Government's expert as to those prehistoric happenings was positive and uncontradicted. He also said that the effect of glacial action on a drainage such as Leon Creek "gouges it out, tends to make it oval, small and smooth so it doesn't have prominent ridges along its course and it leaves a mantle of unassorted debris along the sides quite normally."⁷⁹ Lateral moraines and ground moraines were deposited by ice lobes moving down the canyons. The glacier transported material like an endless belt, and when it melted the material that had accumulated within and on top of the ice mass was dropped in place, and eventually was "reworked through water action giving you a fluvial glacial deposit that has been subjected to the action of water."⁸⁰

The ridges or divides between the major drainages involved in this appeal were not directly affected by the glacial activity from the Grand Mesa. They are in the Wasatch formation, but slope wash⁸¹ and talus have been carried to them from areas above that were covered by the glacier.⁸² The fact that the basalt cobbles and boulders were washed out and carried from the glacier is shown by the presence of such cobbles and boulders, which can be seen "scattered all over the surface," and also is reflected in the references to gravel, cobbles and boulders in more than 45 percent of the Government's logs of exploration.⁸³

⁷⁷ Tr. 357. (Should be Tr. 368.)

⁷⁸ Tr. 356, 358. (Should be Tr. 367, 369.)

⁷⁹ Tr. 359. (Should be Tr. 370.)

⁸⁰ Tr. 359. (Should be Tr. 370.)

⁸¹ The percentage of boulders in glacial till is greater than in slope wash. The boulders in slope wash have been moved by water action from material that was transported by glacial action. Tr. 395.

⁸² Tr. 361. (Should be Tr. 372.)

⁸³ Tr. 362. (Should be Tr. 373.)

The significance of the presence of considerable quantities of boulders below the canal alignment (as seen on Exhibits 28B and 28C) was pointed out by the Government's engineering geologist as follows:

Geologically it has a significance, the fact that the origin or the location source of the basalt boulders [is] the cap rock at Grand Mesa and to transport those boulders down to the location * * * below the canal line, they must have been transported across * * * the area that was crossed by this South Side Canal and, therefore, I would think that you would expect that this wouldn't be an isolated condition but you would have similar boulders scattered all the way from the cap rock at Grand Mesa down to Plateau Creek and down the South Side Canal.⁸⁴

In reviewing observable conditions in the Park Creek and Leon Creek canyons the geologist commented upon the existence of lateral moraines in both canyons. Because of this he would have expected "an erratic, heterogeneous mixture of sand, gravel, cobbles and boulders * * * normally expected in the stream channel and * * * you would expect these boulders to occur at the depth of the morainal deposit and not be only on the surface, but extend to the depth."⁸⁵ He also would have expected an erratic deposition of boulders (slope wash) at the minor structures between the end of the canal (Vega Reservoir end) and the Salt Creek siphon.⁸⁶

Salt Creek had fluvial glacial material and outcrops of sandstone showing, but the glacier did not extend into the Salt Creek valley in the area where that valley was crossed by the canal alignment.⁸⁷ At Salt Creek the Government expert would have expected scattered boulders, bedrock, clay, sandstone, siltstone, plus gravel and cobbles "in the drainages that are washed in."⁸⁸ Because Grove Creek, Oak Creek, Little Creek and certain nearby areas had not been subjected to the actual encroachment he would have anticipated areas of glacial outwash at those locations.⁸⁹

Big Creek and Cottonwood Creek, the geologist said, were glaciated tributaries, with morainal deposits of glacial till.⁹⁰ The area between those streams contained land-slide debris in which one would find "a rather jumbled, erratic surfacial deposit represented by both land slide debris, by slope wash, and * * * bedrock of the Wasatch formation."⁹¹

The Government's expert cautioned that the auger holes and test pits on the divides should not be projected for any appreciable distance,

⁸⁴ Tr. 365.

⁸⁵ Tr. 366.

⁸⁶ Tr. 366.

⁸⁷ Tr. 367.

⁸⁸ Tr. 369.

⁸⁹ Tr. 369-370.

⁹⁰ Tr. 370-371.

⁹¹ Tr. 371.

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and that a test pit "up on the hillside" should not be projected "down into the valley itself along the hillside." He gave as the reason for not doing this "the fact of the erratic depositional nature of the surfacial deposit along the South Side Canal."⁹² To the geologist the principal worth of the auger holes and test pits was to allow an evaluation of the "ranges of conditions that you would expect along the canal."⁹³ He had seen clusters of boulders in glacial material and stated that this condition was neither extremely common nor uncommon—he felt that it was "a normal condition under glacial deposition."⁹⁴

Upon cross-examination the geologist asserted that since an entire project was being evaluated the origin of materials played a very important part.⁹⁵ He provided the following reason for his reluctance to project auger hole 110 from its location on the adjacent divide down into the Leon Creek canyon:

* * * I would evaluate it and say that is the material that was encountered at this location, and that I would not project it in elevation down that slope because recognizing the fact that this is a glacial valley I would then go into a different geologic surfacial deposit by moving down that slope, going down in elevation. I would then encounter the glacial till * * *.⁹⁶

The Government's expert observed also that "you cannot auger a small hole through these boulders;" therefore, clusters of boulders would not be detected by augering.⁹⁷ From his evaluation of the area he would have expected to encounter clusters of boulders in all of the major streams.⁹⁸ He also would have expected a "relatively high" percentage of boulders.⁹⁹ He made the following remark about the soil classification symbols that were given with the logs:

I think these represent the type of material that is capable of being recovered through small diameter explorations. You certainly cannot recover a six-inch rock from a three-inch hole and therefore * * * what is shown on the logs * * * the classification is correct for that material of the fine grained soils that were recovered from the small diameter holes.¹⁰⁰

The Government's engineering geologist agreed with Treco's soils engineer that a concentration of cobbles and boulders could be expected in the bottoms of the valleys in and near the streams.¹⁰¹

⁹² Tr. 372.

⁹³ Tr. 371.

⁹⁴ Tr. 375.

⁹⁵ Tr. 379.

⁹⁶ Tr. 380-81.

⁹⁷ Tr. 384.

⁹⁸ Tr. 384, 387 (the major streams in this case being Park, Leon, Big and Cottonwood Creeks).

⁹⁹ Tr. 389.

¹⁰⁰ Tr. 386.

¹⁰¹ Tr. 402.

Decision

Treco was remiss in providing the prompt notification of alleged changed conditions that is required by Clause 4. However, the contracting officer waived the failure to notify, and since he did the Board will consider Treco's claims upon their merits. In this case the difficulty of ascertaining job conditions with certainty is similar to the problem described in a recent decision by another Board. In *Northeast Construction Company*, ASBCA No. 11049 (February 28, 1967), 67-1 BCA par. 6195, the Board found that an inspector and the resident engineer knew that a considerable amount of stones and boulders were being encountered and removed and knew generally where this was taking place. The Board commented upon the fact that the Government was not given a adequate opportunity to investigate the actual conditions that existed, and stated with respect to records and estimates:

Neither the Government, nor appellant, nor the subcontractor who actually did the work, kept records as to the quantity of stones and boulders encountered or as to the area in which they were encountered and removed. Therefore the evidence on these matters in this case is in the form of estimates by persons who saw some or all of the rock removed. In the case of the Government this is understandable as it had no notice that appellant considered the stones and boulders to be a changed condition and the subject of a claim later to be made. In the case of appellant it seems strange that appellant, if it considered the stones and boulders to be changed conditions, did not keep records with respect to location and quantity. * * * The estimates before the Board are by the Government and by appellant. The Government's estimate is by an inspector who was present with some regularity on the site. Appellant's is by its president and the record does not show that he spent any considerable amount of time on the site. Under these circumstances the Board considers not only that the inspector's estimate is the more reliable of the two, *but also that it should be accepted instead of appellant's because of the prejudice occasioned the Government by the lack of notice.* (Italics added.)

The testimony of Treco's manager must be judged in similar fashion. He did state that he observed the siphon sites at times when the work was going on (one of them at least six times, and another about twelve times). However, he was on the job to perform office management and liaison duties and there is no evidence that he was assigned to carefully assess the condition of the siphon trenches and make a definite and accurate estimate of rock content. Many of the photographs show the sides of trenches that were excavated for the placement of siphon pipe to be standing almost vertically. The photographs taken as a group also do not support the very high rock and boulder percentages testified to by Treco's manager (for example, 80 percent at Park Creek and "in the order of 75 percent" at Salt Creek). Indeed, they are con-

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sistent with the statements of the Government's field engineer that such percentages did not run even in the 60 to 70 percent range except over much of the length of the outlet slope at the Big Creek siphon. The field engineer, who had been in construction work for about 30 years, was a graduate civil engineer, and had been assigned to other large pipeline projects, said flatly that Treco's manager exaggerated the conditions with respect to rock and cobbles. We conclude that Treco, by proceeding to perform the excavation work without mentioning Clause 4, or that a changed condition had been encountered, demonstrated by its own conduct that the rock percentages did not run as high as the estimates given by its manager. We find also that the extreme widths of Treco's trenches resulted principally from the factors specified by the field engineer—Treco's decision to use dozers with wide blades and questionable work methods. The appellant's subcontractor, through the use of a ripper and a smaller tractor was able to keep the siphon trenches within much more reasonable bounds than those which were excavated by the prime contractor, notwithstanding the fact that the subcontractor's excavation was in two of the rockiest canyons, at Big Creek and Cottonwood Creek.

When pay lines are established, ordinarily such action is taken to eliminate the possibility that a project owner may be required to pay a fixed unit price for excavation or other work that is not essential for completion of the project. The Government's field engineer testified that "in many cases" ten percent of over-excavation is normal.¹⁰² In Paragraph 41 of the specifications, considered in its entirety, there is at least as much stress on the point that the expense of over-excavation and the refill of over-excavated areas is to be met by the contractor as there is on the requirement contained in a proviso included in subparagraph 41(a)—the one reserving to the Government the right to require the contractor to excavate to the prescribed pay lines. The contention of appellant's counsel that subparagraph (a) indicates to bidders that it is anticipated by the Government that excavation for structures can be performed within the prescribed pay lines, but that the Government reserves the right to require the contractor to excavate to prescribed pay lines for stated purposes is grounded upon the theory that applicability of the proviso is limited to situations where excavation is being kept within the pay lines. Actually the wording of the subparagraph would seem to authorize an instruction to excavate "in" to prescribed pay lines (if, for example, over-excavation was creating a safety problem) as well as one to remove material "out" to such lines.

¹⁰² Tr. 492.

It would not be reasonable to treat the lines which depict siphon trench walls on Drawing 482-D-192 as representations as to types of subsurface materials. The lines in question are clearly labeled "pay lines." In addition, the typical sections shown are for use at many, many locations along the upper, intermediate and lower sections of seven or eight different siphon sites. In both of those respects this appeal differs from *Morgen and Oswood Construction Co.*, IBCA-389 (April 21, 1966), 66-1 BCA par. 5522, cited by the appellant. The latter case involved an excavation for a small pumphouse (a fixed site of restricted area)—also, the excavation lines were not referred to as "pay lines" on the drawings. Here the fact that pay lines are set forth, rather than definite indications of expected excavation conditions, is as plain as it was in *Henly Construction Company*, IBCA-165 (January 22, 1960), 60-1 BCA par. 2487, in which it is said:

* * * the appellant apparently made the assumption that a ditching machine would be adequate to perform the excavation because the specifications and drawings seemed to indicate a narrow ditch which was to be dug to definite neat lines. The drawings, to be sure, did contain typical sections drawn to definite neat lines but these were to be used for payment purposes only. Thus, it was provided in * * * the specifications:

"The contractor will not be required to excavate the trenches to vertical sides, but regardless of the side slopes and the width of the trenches as actually excavated, measurement for payment of the excavation for the pipe trenches will be made to the widths shown on the drawings, with vertical sides, and to the depths shown on the drawings or prescribed by the contracting officer."

The lines on the typical drawings were found not to be representations.

The Board is unwilling to accept the approach of Treco's expert by which information gained from test pits or auger holes is projected horizontally and vertically for relatively long distances. One of the extreme examples of his suggested projection is at Leon Creek, where the two nearest test pits were above the bottom of the excavation for the uppermost portions of the siphon. There he would have projected the results horizontally more than 1,200 feet and vertically (down into the canyon) more than 300 feet. Such pre-bid thinking with respect to a canal location extending for more than fifteen miles in high country that is marked by canyons, divides and streams would have been imprudent to say the least.¹⁰³ Treco has not

¹⁰³ Even where a project area (a school site) was small and level, the Board in another case, in considering whether first category changed conditions had been encountered, referred to its general treatment of subsurface explorations "as sampling operations, rather than * * * definite representations of conditions which will be encountered throughout an excavation, especially when the area of an excavation is extensive, the subsurface exploration is rather limited, and the information concerning the subsurface exploration is accompanied by caveat provisions * * *." *Wazberg Construction Company*, IBCA-144 (March 31, 1959), 66 I.D. 123, 59-1 BCA par. 2122. The same view of subsurface explorations was taken in *Inter-City Sand & Gravel Co. and John Kovtynovich*, IBCA-128 (May 29, 1965), 66 I.D. 179, 59-1 BCA par. 2215, which considered a job site where the material to be excavated consisted of glacial deposits.

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said that it did this, and whether it did is open to question. In reality, with the possible exception of Salt Creek, the Government did not make representations or provide information as to the subsurface conditions that could be expected at the siphon sites. Statements in the appellant's letters (Exhibits P-3 and 15b) are to this effect, and the on-the-job conduct of Treco and its subcontractors did not correspond to that of a victim of misrepresentation.

For the siphon sites where cobbles and boulders are claimed to have constituted a changed condition (again excluding Salt Creek) there can be no recovery under the first category of the Changed Conditions clause, because the contract did not indicate what the subsurface conditions in the canyons and draws would be. The photographs of excavated trenches at Salt Creek (Exhibits 31a through 31n) do not show conditions of difficult excavation, and by no stretch of the imagination could be said to depict rock excavation in the order of 75 percent (as testified to by Treco's manager), or even 50 percent. Treco's timely claim of a changed condition at Salt Creek (boggy ground) and receipt of payment for that condition without mention of other claims must also be held against it. In July 1960, about two weeks after the Government authorized payment for the conceded Salt Creek changed condition, the appellant wrote a letter (Exhibit 15b) alleging that the Bureau's drill log data was inadequate, that large rock had been encountered, and that over-excavation had been required. Salt Creek was not mentioned in that letter, although Park, Leon, Big and Cottonwood were. Notwithstanding the cobbles and boulders in the stream bottom at Salt Creek, which should have been expected, and the sloughing in the area of saturated soil (the location of the conceded changed condition) the appellant held the over-excavation down to 31.25 percent. Treco's percentage of over-excavation at Park Creek was almost twice as high, and at Grove Creek almost three times. There has not been a submission of convincing or substantial evidence to prove that ledge rock or boulders at Salt Creek should be considered changed conditions under either category of Clause 4.

For Oak, Grove and Little Creeks, Treco's case is so weak that a detailed discussion is not warranted. The appeal record will not support a determination that more than 25-30 percent of cobbles and boulders was excavated at any of those three siphon sites. Treco's principal problem at Little Creek was not with boulders or in excavating the trench; instead, it was deterioration of the trench sides and sub-grade, caused by water in the trench. This resulted from the appellant's inefficient dewatering operation.

This case, insofar as it concerns the siphon sites, boils down then to (i) what happened at Park, Leon, Big and Cottonwood Creeks,

(ii) whether the appellant before placing its bid should have checked the general geological setting of the Southside Canal, and (iii) taking into account the answers to the first two questions, whether a second category (unanticipated) changed condition was encountered.

At Big Creek the excavated material at part of the outlet side of the siphon was about 75 percent cobbles and boulders. There was not enough earth mixed in at this point to hold the trench walls, and sloughing of the walls was the result. This constituted, we believe, a condition of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided in the contract (the second category test). In the remainder of the Big Creek canyon and at Park, Leon and Cottonwood the boulder and cobbles percentages may have run as high as 35 percent to 55 percent, but the appellant has not established that they ran higher. To the geologist, who from a review of available literature and an observation of the site, realized that glacial tongues had moved down those canyons, the cobbles and boulders were conditions that should have been expected and were not unusual. The appellant's expert, when he was asked about glacial action in a stream channel, professed not to have knowledge in that "area of detailed geology." He also stated that he "probably should check with the geologist" to learn how a cluster of boulders was produced.

Appellant's counsel asserts that a contractor is not charged with the knowledge of a geological expert, citing *Urban Construction Corporation*, ASBCA No. 8792 (January 31, 1964), 1964 BCA par. 4082, as a decision in which it is "noted that construction contractors are not expected to retain geologic experts in the course of preparing bids." The appeal in *Urban* arose under a contract for a 480-unit housing project in Maine. The Government had made 242 borings within the area where the houses were to be built. The decision contains the following statement:

Plotting the top of rock contours using all of pertinent borings, as was done by the Government consultant, then utilizing that data and the construction plans to prepare rock volume estimates is the best method available in this case. Expert opinion can differ in certain locations, as it did here, in determining rock topography from the boring logs. For example, the Government consultant was able to project the top of rock contours under areas below the bottoms of borings in which no refusal was met, with reasonably accurate results. We are not persuaded, however, that construction contractors are required to have the expert knowledge necessary to do this, or to hire consultants to do so on a housing project.

A conclusion such as that quoted above cannot be taken as justification for Treco's overlooking of the matter of the origin of the materials in

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the glaciated valleys, if in fact that matter was overlooked.¹⁰⁴ Treco's letters show that its officials believed that the logs were of little or no help, since they state that conditions were indeterminate. The appeal record indicates that if at the time of pre-bid activity Treco had obtained the services of a soils engineer instead of those of a geological expert, Treco would have found out that the area had been glaciated, but probably would have been consulting with an individual who could not provide reliable information about the effect of glacial action in stream channels. There are a great many observable boulders in the Southside Canal area and below that area, and Treco had more than enough clues that basalt had been moved from outside of the project area into that area and beyond. An adequate site investigation includes the asking of questions about relevant matters not otherwise disclosed. *Petroleum Tank Service, Inc.* ASBCA No. 11043 (June 30, 1966), 66-1 BCA par. 5674. The appellant in the circumstances of this case, must be charged with the requirement of checking with a geologist or learning otherwise that in the project area there were canyons down which glacial material had been transported, and that such a happening leaves a layer of unsorted debris along the sides of a canyon. Such debris may contain a high percentage of cobbles and boulders (a "very high bouldery soil").¹⁰⁵

The relatively high rock excavation unit price bid by Treco, \$2.25 per cubic yard, suggests that Treco in bidding realized that some of the unclassified excavation work would be difficult. Tractor work of the type performed by Brasier Bros. at Big Creek and Cottonwood Creek in all probability would have held the over-excavation at the inlet and center sections of Big Creek to or below the percentage achieved by Brasier Bros. at Cottonwood Creek (20.86 Percent)—this also would have been the case along the entire Park and Leon Creek pipe alignments. The Board's holding is, therefore, that Treco did not encounter second category changed conditions at any of the siphon sites other than the previously described section of the outlet side of Big Creek.

We find also that there was no constructive change at the siphon sites. In directing over-excavation in the siphon pipe trench bottoms, in authorizing the obtaining of backfill from sources other than the excavation, and in reaching an agreement with the appellant on a price for overhaul, the Government was merely following alternative courses of action that were provided for in the specifications. During

¹⁰⁴ A contractor seeking to establish second category changed conditions should show not only that the conditions were unexpected to him but also that they would have been generally regarded as unexpected by others engaged in the same type of operations. *J. A. Terteling and Sons, Inc.*, IBCA-27 (December 31, 1957), 64 I.D. 466, 484, 57-2 BCA par. 1539.

¹⁰⁵ T- 401

the time that the appellant was performing siphon trench excavation work with its own forces in 1959, it did not express surprise or dismay about placing a backfill cushion in the bottoms of the trenches or obtaining material from other sources. The overhaul price was established by agreement during Treco's first few months of construction operations. It would seem that occurrences on the job as substantial progress was made in 1959 came very close to what Treco had expected.

Minor Structures (Culverts, Chutes, etc.)

The minor structures were constructed on the benches in slope wash material. The parties stipulated as to the conditions that were found when excavation work was performed for the culverts, CHO turnouts, overchutes, flumes, drainage inlets, and other minor structures that were built along the canal.¹⁰⁶ When the material that actually was excavated by Treco at the locations for minor structures is compared with the material shown on the nearest logs of exploration furnished by the Government, no basis for allowance of a changed conditions claim is found.

Photographic exhibits No. 39 through 54 also undermine the claim that changed conditions were found in the work at the minor structure sites. Cobbles or boulders did not pose a construction problem at most of those sites. The appeal record does not show that the discovery of cobbles and boulders at the twenty or so sites where this happened was considered at the time by either party to be contrary to what the Government had indicated, or unusual. The contracting officer correctly denied the changed conditions claim as it concerns the minor structure sites.

Conclusion

A changed condition was encountered on the outlet side of the Big Creek siphon. As to that area the parties should negotiate for the equitable adjustment specified in Clause 4. Such negotiation should take into account the stipulation received by the Board on July 25, 1966, which withdraws part of the appellant's claim because certain work was performed by Brasier Bros. Construction Co.

The remainder of the appeal is denied.

DEAN F. RATZMAN, *Chairman.*

I CONCUR:

I CONCUR:

THOMAS M. DURSTON,
Deputy Chairman.

WILLIAM F. MCGRAW, *Member.*

¹⁰⁶ Tr. 504-513.

ON LANDS WITHIN THE GEOLOGIC STRUCTURES OF PRODUCING
OIL OR GAS FIELDS

**ISSUANCE OF NONCOMPETITIVE OIL AND GAS LEASES ON LANDS
WITHIN THE GEOLOGIC STRUCTURES OF PRODUCING OIL OR
GAS FIELDS**

Oil and Gas Leases: Known Geological Structure

Land which becomes within the known geological structure of a producing oil or gas field before the actual issuance of a lease, even though it was not within such a structure at the time when the offer for the lease was filed, may not be leased noncompetitively.

Oil and Gas Leases: Noncompetitive Leases

The filing of an offer for a noncompetitive lease creates no vested rights in the offeror, and, if lands embraced in the offer become within a known geological structure of a producing oil or gas field after the filing of the offer but before the issuance of a lease, the offer must be rejected and no preferential rights will be conferred upon the offeror.

M-36686

September 5, 1967

TO: SECRETARY OF THE INTERIOR.

**SUBJECT: ISSUANCE OF NONCOMPETITIVE OIL AND GAS LEASES ON LANDS
WITHIN THE GEOLOGIC STRUCTURES OF PRODUCING OIL OR GAS FIELDS.**

Section 17(b) of the Mineral Leasing Act of February 25, 1920, as amended, 30 U.S.C. sec. 226 (b) (1964), provides that "If the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding * * *." Despite this unequivocal language, noncompetitive leases have been issued on lands which at the time of issuance are within known geological structures of producing fields, although it is conceded that such leases are issued only where the structure becomes known between the filing of the offer for the lease and the issuance of the lease itself. This Departmental position was expressed in *George C. Vournas*, 56 I.D. 390, 393 (1938), where it was stated:

* * * Whether the lands involved in an application for an oil or gas lease are or are not within the known geologic structure of a producing oil field is judged as of the time of the filing of the application. * * *

This position was followed in *Macson Oil Company*, A-28970 (July 30, 1962).

Despite the fact that this interpretation has been followed by the Department for so many years, it is our opinion that it is clearly inconsistent with the words of the statute and completely at variance

with the Departmental interpretation of comparable provisions in other sections of the Mineral Leasing Act, as amended and supplemented (30 U.S.C. secs. 181-287). Moreover, this interpretation necessarily rests upon an assumption that a qualified person filing an offer for a noncompetitive oil and gas lease thereby acquires a vested right in the lands covered by the offer, but the Department and the courts have consistently held that an offeror acquires no vested right. From time to time in the past, the Departmental interpretation of section 17 with respect to the issuance of leases on lands found, after the filing of an offer, to be within known structures has been questioned, but no action has been taken to change it. We should delay no longer in adopting the only proper interpretation of the statute so that we may prevent both the further passage of windfalls to lease applicants and further losses by the United States of money which should accrue to it from competitive bidding.

I

As we have pointed out, the statutory language of section 17(b) is unequivocal. "If the lands to be leased are within any known geological structure * * * they shall be leased * * * by competitive bidding * * *." The ordinary reading of this provision would be that once lands are known to be within the geological structure of a producing oil or gas field they are no longer subject to leasing except by competitive bidding. The only possible exception to this rule would seem to be where the applicant for a lease has a vested right to such a lease. However, the courts and the Department have always held that the filing of an offer for a noncompetitive oil and gas lease does not grant the offeror any vested right. In *Haley v. Seaton*, 281 F. 2d. 620, 624 (D.C. Cir. 1960), the court said that "mere application for leases granted no vested rights in Haley." Other cases in which the courts have held that an offer creates no vested right in the offeror include *United States ex rel. Roughton v. Ickes*, 101 F. 2d. 248 (D.C. Cir. 1938), and *Dunn v. Ickes*, 115 F. 2d. 36 (D.C. Cir. 1940), *cert. den.* 311 U.S. 698 (1940). Except for giving this very favorable treatment to offerors with respect to lands found to be on the known geologic structure of a producing field after the filing of an offer, the Department has consistently held to this view that the filing of an offer grants no vested right. An offeror is merely assured of a preferential right to a noncompetitive lease if such a lease should be issued.

Pending offers have always been held to be subject to any statutory amendments enacted between the filing of the offer and the issuance of the lease. The Department took this position in *Harold Ladd Pierce*, 69 I.D. 14 (1962), with respect to the Mineral Leasing Act Revision of

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September 2, 1960 (74 Stat. 781). Even though section 8 of the Mineral Leasing Act Revision provided that "No amendment made by this Act shall affect any valid right in existence on the effective date of the Mineral Leasing Act Revision of 1960," the Department held that a lease issued after September 2, 1960, on an offer filed on June 9, 1959, was subject to all the provisions of the Mineral Leasing Act Revision. A similar position was taken by the Department with respect to amendments made by the Act of July 29, 1954 (68 Stat. 583), in *United Manufacturing Company et al.*, 65 I.D. 106 (1958). On page 110 of that case the Department stated:

* * * the Department has consistently held that an applicant for a noncompetitive lease acquires no vested right to a lease by the filing of an application but only an inchoate right to receive a lease over a later applicant, if the Secretary in his discretion decides to lease the land. * * *

The Department does not hesitate to withdraw lands embraced in a pending offer, and in such a case the offeror receives no lease and no compensation for his unsuccessful offer. In the case of *H. T. Berr, III*, A-28678 (November 2, 1961), the Department held that an oil and gas offer may properly be rejected where the land embraced in the offer was selected by the State of Alaska after the filing of the offer and no compensation was given to the offeror. Since a lease offer, being merely an inchoate right, is subject to every other change in the status of the land sought, it is anomalous that it is not subject to subsequent determinations that the land is on a known geologic structure.

II

With respect to other minerals such as potassium and coal, the Mineral Leasing Act provides for prospecting permits which have many of the characteristics of the noncompetitive leases issued for oil and gas. In regard to potassium it is provided that "lands known to contain valuable deposits" shall be subject to leases issued through competitive bidding, 30 U.S.C. sec. 283 (1964), while a prospecting permit may be granted to the first applicant for land not known to contain potassium, 30 U.S.C. sec. 281 (1964). In *Sawyer Petroleum Company, H. Byron Mock*, 70 I.D. 9 (1963), the Department rejected Mr. Mock's application for a potassium prospecting permit on the grounds that the land had become "known to contain valuable deposits" after the filing of his application for a permit but before a permit had been issued.

Similarly, in *Claude P. Heiner*, 70 I.D. 149 (1963), the Department rejected Mr. Heiner's application for a coal prospecting permit on the ground that, subsequent to the filing of his application for a permit, the land became known to contain coal.

Comparable positions are taken by the Department with respect to other minerals under the Mineral Leasing Act. Only with respect to oil and gas has the subsequent determination that the land is known to be valuable not denied the applicant a noncompetitive lease or permit.

III

Since the practice of issuing noncompetitive leases on land embraced in geological structures of producing oil or gas fields which become known after the filing of a lease is inconsistent with the specific words of the statute, with the Departmental interpretation of comparable provisions relating to other minerals, and with the Departmental and judicial recognition that the filing of an offer creates no vested right in the offeror, the only justification for the existing practice is long standing administrative practice.

Long standing administrative practice never serves to excuse a departure from the strict letter of the law. Nevertheless, since it is certain to be raised by those opposed to the correct interpretation, it would be wise to consider how this practice began.

Noncompetitive leases were first authorized when the Mineral Leasing Act was amended by the Act of August 21, 1935 (49 Stat. 674). Prior to that amendment, section 13 provided for the issuance of permits giving permittees exclusive rights to prospect for oil and gas on lands which "are not within any known geological structure of a producing oil or gas field * * *." At the time of the 1935 amendment, prospecting permits were issued for land on a known geological structure where the structure became known after the filing of an application but before the issuance of the permit. Since the noncompetitive lease under section 17 was generally regarded as the successor of the prospecting permit under section 13, the same practice was adopted for the lease and has been followed since.

We must, therefore, look back to those days before 1935 when permits were authorized to determine how this unfortunate practice originated. Here we discover that this has not always been the rule. When Secretary Payne issued *Regulations* in 1920, he provided in the Appendix of Circular No. 672 (as amended to October 29, 1920), "Oil and Gas Regulations" (47 L.D. 437, 466) :

PENDING APPLICATION FOR PERMIT, LAND DESIGNATED AS OIL STRUCTURE—Where after application under section 13 for a permit and before permit is granted the land is designated as within the structure of a producing oil or gas field, permit can not be allowed.

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With the change of administration on March 4, 1921, Mr. Albert Fall became Secretary of the Interior. On April 23, 1921, Secretary Fall reversed this position by *Instructions* printed in 48 L.D. 98. To justify this reversal, he likened the filing of an offer for an oil and gas prospecting permit to the filing of a homestead application and the performance by the entryman of all acts necessary to complete his application. However, this is quite a different matter, since in the homestead situation an entryman is deemed to have earned equitable title, and the Department's subsequent action is merely ministerial. The position of an applicant for an oil and gas prospecting permit or noncompetitive lease is in no way similar. Pursuant to the statute, the Secretary has always retained the discretion to refuse to grant a permit or lease. All the offerer has is a preferential right to a permit or noncompetitive lease if one should be issued. He has no vested right to have such a permit or lease issued.

It should be noted that prior to the act of July 17, 1914 (38 Stat. 509), a homestead applicant lost all rights to the land embraced in his homestead entry whenever it was shown to be mineral land before he had acquired a vested right in that land. *Diamond Coal and Coke Co. v. United States*, 233 U.S. 236 (1914); *Leonard v. Lennox*, 181 Fed. 760, 763 (8th Cir. 1910); *Jones v. Driver*, 15 L.D. 514 (1892).

Since the 1914 Act an entryman has been able to acquire title to his homestead by agreeing to a waiver of minerals under that statute, but the rule is still essentially the same, namely, that he may lose all rights to an unrestricted patent if, at any time prior to his acquisition of a vested right to such a patent, the land should be held to be valuable for minerals. *Cleveland Johnson (On Rehearing)*, 48 L.D. 18 (1921).

Similarly, it has been held that the time of determining whether land covered by a railroad land grant statute was mineral land was the time when the Department passed upon the issuance of a patent to that land. Until the railroad company's rights became vested, a determination that land was mineral would deny the land to the company. *Barden v. Northern Pacific RR. Co.*, 154 U.S. 288 (1894); *Burke v. Southern Pacific RR. Co.*, 234 U.S. 669 (1914); *United States v. Southern Pacific Co.*, 251 U.S. 1 (1919); *Cowell v. Lammers*, 21 Fed. 200, 206 (C.C., D. Cal. 1884); *Central Pacific RR. Co. v. Valentine*, 11 L.D. 238 (1890).

In other words, at the time of Secretary Fall's action (as well as at the present time) it was quite customary for a mineral determination to terminate an application at any time prior to the applicant's acquisition of a vested right. As we pointed out above, the courts have

consistently held that the filing of an oil and gas lease offer creates no vested right. Consequently, there was no logical basis for Secretary Fall's action in 1921, and there is none for adhering to his interpretation today.

IV

Because the Department's present practice is contrary to the statute, it must be immediately changed. We have enclosed a proposed amendment to the regulations which embodies the proper interpretation, and we request that you approve it. Since this interpretation is required by law, it would be improper to publish it as proposed rulemaking, and we have, therefore, prepared the amendment to be effective immediately upon publication. While we recommend that the new interpretation be made immediately effective as far as pending offers are concerned, we do not propose to act against leases issued in the past in accordance with the mistaken policy. Precedent for taking no action against such leases is found in *Franco Western Oil Co. (Supp.)*, 65 I.D. 427 (1958).

FRANK J. BARRY,
Solicitor.

UNITED STATES
DEPARTMENT OF THE INTERIOR
WASHINGTON
CODE OF FEDERAL REGULATIONS
TITLE 43—PUBLIC LANDS: INTERIOR
CHAPTER II BUREAU OF LAND MANAGEMENT, DEPARTMENT
OF THE INTERIOR
SUBCHAPTER B—LAND TENURE MANAGEMENT (2000)

[CIRCULAR 2231]

PART 3120—OIL AND GAS
SUBPART 3122—ISSUANCE OF LEASES
SUBPART 3123—NONCOMPETITIVE LEASES

Oil and Gas Leases on Known Geological Structures of Producing Oil or Gas Fields

Section 17(b) of the Mineral Leasing Act of February 25, 1920, as amended 30 U.S.C. sec. 226(b) (1964), provides that "If the lands to be leased are within any known geological structure of a producing oil or gas field, they shall be leased to the highest responsible qualified bidder by competitive bidding * * *." It has been erroneously assumed that, if the lands embraced in an offer for a noncompetitive lease are

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not within the known geological structure of a producing oil or gas field at the time when the offer is filed, a noncompetitive lease may be issued even though the lands have become within such a structure before the lease is issued. Since the statutory requirement quoted above is not qualified in any way, it is clearly unlawful to issue a noncompetitive lease for land which at the moment of issuance is within the known geological structure of a producing oil or gas field. Accordingly, 43 CFR 3122.1(a) and 43 CFR 3123.3(c) are hereby amended to make it absolutely clear that no noncompetitive lease may be issued for lands which are at that time within the known geological structure of a producing oil or gas field.

Since the amendments merely put into the regulations a statutory requirement which may be modified only by congressional action, notice and public procedure thereon are deemed unnecessary, and these amendments will become effective upon publication in the *Federal Register*. They will be applicable to all offers pending at the time of publication, but will not be applied retroactively to leases already issued.

1. The second sentence of 3122.1(a) is amended to read as follows: "When land is within the known geologic structure of a producing oil or gas field prior to the actual issuance of a lease, it may be leased only by competitive bidding and in units of not more than 640 acres to the highest responsible qualified bidder at a royalty of not less than 12½ percent."

2. A new subsection (c) is added to 3123.3 as follows: "(c) If, after the filing of an offer for a noncompetitive lease and before the issuance of a lease pursuant to that offer, the land embraced in the offer becomes within a known geological structure of a producing oil or gas field, the offer will be rejected and will afford the offeror no priority."

STEWART L. UDALL,
Secretary of the Interior.

September 5, 1967

UNITED STATES

V.

ROBERT E. ANDERSON, JR. ET AL.

A-28260 (SUPP.) *Decided October 18, 1967***Mining Claims: Discovery**

To satisfy the requirement for discovery on mining claims located for perlite, it must be shown, in addition to the fact that there is a reasonable prospect that the perlite can be mined, transported from the mine to the shipping point, screened and crushed and sold at a price which would yield a profit, that there is an existing demand for the crushed product and that a reasonably prudent man would be justified in expending his time and effort in his attempt to capture a share of the existing market.

Mining Claims: Determination of Validity—Mining Claims: Discovery

Where it has been shown as to a number of mining claims located for perlite, and for which applications for patents have been filed, that the amount of the deposits on the claims is excessively large in relation to the market that exists, only those claims can be found valid which by reason of location and volume and quality of deposits would make the most feasible mining operation and have a reasonable prospect of success; the remaining claims must be held invalid for lack of discovery.

SUPPLEMENTAL DECISION

On February 20, 1963, the Department remanded for further hearing four contests involving 16 placer mining claims. That decision (*United States v. Robert E. Anderson, Jr., et al.*, A-28260) recited that applications for mineral patents covering 14 of the claims, located within the limits of the Santa Fe National Forest, were filed on October 15, 1953;¹ that applications for patents on the other two claims, located on the public domain, were filed on April 15, 1954;² and that contests were brought against the claims in January 1957 on the ground, among others, that valid discoveries of minerals had not been made within the limits of the claims. The decision referred to the fact that the hearing examiner, by decisions of May 29, 1958, and June 9, 1958, had rejected the patent applications and that the Acting Director, Bureau of Land Management, in his decision of August 26, 1959, had not only affirmed the action of the hearing examiner in rejecting the patent applications but had declared the claims to be null and void.

¹ Contestees in Contest Nos. 49 and 50 are: Robert E. Anderson, Jr., and M. B. Anderson, individually and as heirs at law of R. E. Anderson, deceased, Louise Parrish Anderson, E. P. Chapman, Jr., Virginia H. Chapman, John A. Wood and Helen S. Wood.

² Contestees in Contest No. 54 are: Robert E. Anderson, Jr., Dexter H. Reynolds, Susie C. Reynolds, E. P. Chapman, Jr., Virginia H. Chapman, John A. Wood and Helen S. Wood. Robert E. Anderson, Jr., is the sole contestee in Contest No. 55.

October 18, 1967

The premise of those decisions was the same, that the evidence produced at the hearings did not show that the perlite deposits on the claims met the test of marketability because there was no showing of a present demand for perlite from the claims.

The Department found that the testimony on an important phase of the case, namely, the cost of hauling the perlite found on the claims to the proposed shipping point at Domingo, New Mexico, was so vague and uncertain that it was impossible to reach a sound conclusion as to whether the perlite on these claims is marketable. The Department pointed out that the testimony of the contestant's witnesses was conflicting on even the most basic issue of the distance by road from the claims to the shipping point and that their testimony as to the necessity for and cost of road building and road maintenance was nothing more than the witnesses' opinion on such matters, with nothing in the way of facts to show the basis for their opinions, and that the testimony of the contestees' witnesses to the effect that the cost of transporting the perlite to the shipping point would leave a small profit from the operation and thus meet the prudent man test of the mining laws was unconvincing. Therefore, the case was remanded for a second hearing, the hearing to be limited to the question of the cost of transporting the material from the claims to Domingo. The hearing examiner was instructed to evaluate the testimony introduced to determine whether, in the light of that testimony and in the light of *Solicitor's Opinion*, M-36642, 69 I.D. 145 (1962), any change was warranted in his ultimate conclusion that valid discoveries have not been made on the 16 claims involved.

The Solicitor's Opinion referred to discussed the "marketability rule" as applied to the law of discovery under the mining laws. It concluded that there is no basis for making any change in the test which the Department applies to mining claims in determining whether there has been a valid discovery. It found that the prudent man test applied by the Department is based on the statutory requirement that only "valuable mineral deposits" may be located and it reiterated the accepted interpretation of a valuable mineral deposit as one the discovery of which would justify a man of ordinary prudence in the further expenditure of time and money with a reasonable prospect of success in the effort to develop a paying mine.³

The opinion pointed out that marketability is but one aspect of the

³ Set forth by the Department in *Castle v. Womble*, 19 L.D. 455 (1894), approved by the United States Supreme Court in *Chrisman v. Miller*, 197 U.S. 313 (1905), and reaffirmed in *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963).

test, since a prudent man would not be justified in developing a mineral deposit if the extracted minerals were not marketable. It stated that, while an intrinsically valuable mineral is by its very nature deemed marketable and merely showing the nature of the mineral usually meets the test of marketability, in the case of nonmetallic minerals found in a great many places application of the prudent man test requires that a market for the mineral be shown by the locator. The opinion also stated that when a nonmetallic mineral is not of extremely wide occurrence and when a general demand for that mineral exists, it may be enough, instead of showing an actually existing market for the product of that particular mine, to show that a general market for the substance exists of a type which a reasonably prudent man would be justified in regarding as one in which he could dispose of those products. The opinion stressed that each case must be judged on its own facts.

The second hearing called for by the decision of February 20, 1963, was held on September 18 and 19, 1963, and, on June 30, 1964, the hearing examiner rendered his second decision on these claims.

The hearing examiner recited certain stipulations entered into by the parties, including one that the parties, in discussing costs, would be referring to present costs. After reviewing the evidence presented at the second hearing, the hearing examiner included in his decision a comparative summary of the estimates of the parties as to the cost of transporting the perlite from the claims to the proposed shipping point. This summary shows that the contestant estimated that the transportation cost per ton, including hauling cost and road construction and road maintenance, would be \$2.29 from the Canovas claims, those located in the national forest, and \$1.60 from the other two claims, located some six miles nearer to Domingo, while the contestees estimated the cost per ton from the Canovas claims at \$1.76 and from the other two claims at \$1.55.⁴ The examiner noted a difference of 53 cents per ton between the two estimates covering the Canovas haul but attributed the difference not only to the difference in type of haul road, construction, and maintenance, but also to the method of estimating direct hauling costs. He pointed out that the contestant contemplates the construction and maintenance of a haul road of a more permanent type than the road contemplated by the contestees but noted the contestees' insistence that the road which they proposed to build and maintain would be adequate for the purpose.

The examiner determined that the two estimates were sufficiently comparable, taking into account the fact that estimators often differ

⁴ The estimates were based on hauling 50,000 tons per year and on amortization of the road construction and maintenance costs over a 20-year period.

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in opinion as to particular items making up an estimate. He reached the conclusion that the cost per ton of transporting the perlite from the Canovas claims to the proposed shipping point would be approximately \$2. He determined that with this cost figure for hauling perlite and with the estimate by the contestant at the first hearing as to the cost of mining and screening the perlite, \$2.50 and \$2.25 per ton, respectively, a total cost of \$6.75 per ton, the contestees could make a profit, based on the 1956 selling price for perlite, which was \$8 per ton.

However, after discussing the Solicitor's Opinion of 1942⁶, *supra*, he concluded, from a consideration of the entire record, that while there is a general market for perlite any demand for perlite has been adequately supplied by existing facilities and that the evidence presented is insufficient to show, clearly and unequivocally, that a general market for the perlite from the subject claims exists of the type which a reasonably prudent man would be justified in regarding as one in which he could dispose of the perlite from these claims. He stated:

In the absence of such general market, no outlet appears for disposing of the perlite from the subject claims and there would be no incentive or purpose in mining, removing and transporting said perlite from these claims.

He concluded that the requirements of the marketability rule as applied to the law of discovery under the mining laws have not been adequately satisfied with respect to the perlite within any of the subject mining claims and that the claims are null and void for lack of such discovery.

The contestees appealed to the Director, Bureau of Land Management, from the hearing examiner's decision of June 30, 1964. Thereafter, they requested that jurisdiction over the appeal be exercised by the Secretary of the Interior. By letter dated November 4, 1964, the attorneys for the contestees were notified that the Secretary would assume jurisdiction.

At the outset one contention by the contestees should be disposed of. This is the argument that because the case was remanded for a second hearing solely on the issue of transportation costs the Department must have found in contestees' favor in all other factors relating to marketability of the perlite from the claims. This is not so. At the first hearing there was a great deal of testimony on road and other haulage costs. Because of the stress placed on the issue of transportation costs, the fact that the case could turn on it, and the probability that positive and definite evidence could be developed on the issue, it was believed

desirable to secure comprehensive and specific evidence on the question. This might render unnecessary consideration of other factors relating to marketability which are not as susceptible of definite proof. Consequently, the examiner was not precluded, in view of his findings as to transportation costs, from considering other factors relating to marketability.

The contestees contend that the hearing examiner was in error in holding that no discovery has been made on those claims after admitting that the evidence in the record shows that the perlite is of commercial quality and quantity, that there is a general market for perlite, and that perlite from these claims can be mined, transported, screened and sold at a price which would show a profit from the operation. They contend that his decision was based on the erroneous premise that while there is a general market for perlite, there is only a prospective demand for the perlite from these claims and that in the absence of a clear and unequivocal showing of a general market for the perlite from those claims, no outlet appears for disposing of the perlite. They contend that the hearing examiner misapplied the Solicitor's Opinion in that he, in effect, equated perlite with sand and gravel. They contend that perlite is not a mineral of extremely wide occurrence and that they have shown that a general market for perlite exists and that they are justified in regarding that market as one in which they could compete.

The contestant, urging that the hearing examiner's decision be upheld, denies that the hearing examiner made all of the admissions which the contestees attribute to him or that he misapplied the Solicitor's Opinion. It contends that the hearing examiner did not find that the subject deposits could be operated at a profit but, instead, in referring to the single viewpoint of profit, the examiner found that material from the subject deposits could be transported to the proposed shipping point at a cost less than the \$8 per ton average selling price for perlite in 1956. It contends that he did not find and the evidence will not support a finding that the subject deposits could, in fact, be sold in the general market at \$8 per ton. Contestant also points to the fact that the cost per ton mile for hauling the perlite from the claims to the shipping point does not take into consideration the fact that between the dates of the first and second hearings the Rio Grande Bridge was completed at a cost of \$201,000 and that the cost of this bridge should be included to determine the transportation cost at the time of the original hearing. Considering this cost, the contestant says, the actual cost of the mining, extracting and transportation of the deposits would be \$9.58 per ton for the Canovas claims and \$8.72 per

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ton for the other two claims, which the contestant says is in excess of the market price.

We are dealing here with perlite, which is "a rock of volcanic origin containing silica and chemically bound water and perhaps gases and other liquids that, when rapidly heated to a suitable temperature in its softening range, undergoes great expansion because of volatilization within the softened mass of the gases and/or liquids. * * * From a virtual unknown in the commercial world in 1946, perlite had become by 1953 an annual \$10 million industry."⁵

"When crude perlite is crushed, sized, and heated quickly to its softening temperature, entrapped water is converted to steam, suddenly 'popping' the fragments into particles of fluffy glass foam and transforming this rock into a commercial commodity with important uses in the construction industry."⁶

While very little information had been published on the reserves of perlite in the United States at the time the first hearings on these claims was held, a Geological Survey bulletin introduced in evidence stated that while more exploratory work was necessary before a reasonable estimate of reserves could be given nevertheless estimates published by a few companies showed extensive reserves. The bulletin mentions specific deposits in the various Western States estimated to contain many millions of tons and states that a deposit in Napa County, California, where quarrying was started in 1951, is said to contain 125 million tons.⁷

It is known that extensive perlite resources occur in Arizona, California, Nevada, New Mexico, Oregon, Utah, and, to a lesser extent, in other Western States. While no comprehensive estimate of reserves is available, the total reserves of usable perlite are adequate for any foreseeable future needs. However, discovery of areas in the eastern United States favorable as new sources seems unlikely.⁸

Thus, it may be said that, at least since 1946, a perlite deposit may be a valuable mineral deposit within the meaning of the mining laws, since a commercial use for the rock has been found. However, although it is not of extremely wide occurrence geographically, apparently perlite exists in the United States in such quantities as to far exceed any reasonably foreseeable demand therefor.

⁵ Perlite, *Mineral Facts and Problems*, Bulletin 556, Bureau of Mines (1956), p. 595.

⁶ Perlite, *Mineral Facts and Problems*, Bulletin 585, Bureau of Mines (1960), p. 581.

⁷ *Perlite Resources of the United States*, Geological Survey Bulletin 1027-1 (1956), p. 392 (Contestant's Exhibit A).

⁸ Perlite, *Mineral Facts and Problems*, *supra* note 6, p. 586.

While there is a general market for crude perlite, this market apparently exists only for the product after it has been screened and crushed. The demand for crude perlite is limited by the uses which have been found for the expanded product. Although many expanders of perlite have their own sources of supply, all expanders apparently buy crude perlite only after it has come through the screening and crushing operation. Thus, an essential part of any perlite mining operation consists of the plant and equipment required to handle the perlite from the time it leaves the claim until it is ready to load into freight cars.

In such a situation, whether a particular mining claim located for perlite contains a valuable mineral deposit within the meaning of the mining laws depends upon whether there is a reasonable prospect that the perlite on that claim can be mined, transported, crushed, and sold in the existing market at a profit. Furthermore, although in the case of perlite a mining claimant, in order to obtain a patent, need not, necessarily show that there is an existing market *for the product of his claim*, such a claimant must show that he is justified in his belief that he can dispose of the product of his claim in the existing market at a profit.⁹ See Solicitor's Opinion, *supra*.

Whether this standard has been met is not easy to determine in light of the facts in this case.

First, there is the question of the physical location of the claims and the huge amounts of mineral they contain. We have two groups of

⁹ In a recent case the Department reexamined the relation between profit and discovery in the validation of mining claims and stated:

"The requirement that a claimant with a low-grade deposit show that he can make a profit does not mean either that profit must be proved as a certainty or that it must be established as a present fact. The evidence need only support the conclusion that a person of ordinary prudence would risk his labor and means with a reasonable expectation of developing a valuable mine.

The contestee asserts that to allow the Government to prevail 'would mean that for all practical purposes, this great ore deposit * * * would be locked in the ground forever.' (Answer Brief of Contestee-Appellee, p. 101). On the contrary, the rule we apply here insures only [that] the public lands of the United States are not placed in private hands to be no longer available for disposition or use for public purposes.

We conclude that the record must contain evidence of probable costs of extracting, processing, and transporting the mineral product for comparison with the price for which it can be sold. These facts need not be proved to a certainty but the evidence must be of such character taken with all the other evidence to satisfy the Secretary that a person of ordinary prudence would probably make a profit from his investment of labor and capital. As the Department pointed out long ago:

"[T]he mineral deposit must be a 'valuable' one; such a mineral deposit as can probably be worked profitably; for otherwise, there would be no inducement or incentive for the mineral claimant to remove the minerals from the ground and place the same in the market, the evident intent and purpose of the mining laws.' *Cataract Gold Mining Company et al.*, 43 L.D. 248, 254 (1914)." *United States v. New Jersey Zinc Company*, 74 I.D. 191, 196 (1967).

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claims, 14 in one group covering approximately 2,165 acres of land in a national forest and 2 in the other group covering 200 acres of public domain land, containing, according to the testimony of the contestees, over twenty-five million tons of commercial grade perlite (1957 Tr. 213, 363).¹⁰ The extent of the haul from the claims in the national forest to Domingo has been established at 24.3 miles, or 26 miles if extended to the center of the claims. The haul from the other two claims would be 18.3 miles.

Next we note that the roads and plants necessary to mine, transport, and process the perlite for market are not yet in existence. The proposal under which these claims would be developed into paying mines includes the construction and maintenance of suitable roads and the building of a crushing plant in Domingo by the side of the railroad. The roads were not at the time of the hearings in suitable condition to permit an economic haul of the material to Domingo. It is only after a vast amount of work is done on the realignment and improvement of existing roads that, with constant maintenance, it is estimated that the cost of haulage would be such as would show a profit from the operation provided 50,000 tons of perlite per year were disposed of. Although the claimants intend to build the crushing plant at an estimated cost of \$200,000, the design for the plant had not, at the time of the original hearing, been agreed upon. This was because, according to the testimony introduced by the contestees:

Now, in making a properly sized product it is not simply a question of screening and having the proper amount between sieves in your final product. If you don't crush properly you are very likely to wind up with large amounts of unusable material in one or more size fractions. So that after determining the products which you wish and the proper proportion and ratio, it becomes necessary to adapt your crushing procedure to produce as closely as possible to proper proportions throughout the size ranges, and we believe that if we build a plant capable of producing plaster and concrete aggregate feeds, that we might well find, as the new markets develop, that very major structural changes would be required to produce the proper material for the new markets, and while we were certain that we could absorb a profitable segment of present markets, we felt it was only sound business to develop what we believe will be larger markets prior to actual installation of the plant. (1957 Tr. 192-193).

Other testimony offered by the contestees indicates that the claimants, once patents issue, "propose to aggressively bring the mines to production and to construct the necessary facilities to effectuate that

¹⁰ "1957 Tr." is used to designate the transcript of hearing in 1957 in Contests Nos. 49 and 50. A much briefer second hearing was held immediately thereafter in Contests Nos. 54 and 55. The transcript of that hearing will be referred to as "1957 Tr., Contests Nos. 54 and 55."

and * * * are ready, willing and able to do whatever is required to accomplish that end" and that it might cost roughly in the neighborhood of \$800,000 "to get this operation into economic exploitation" (1957 Tr. 273, 274, 381).

Finally, the contestees rely not only on the existing market for perlite to justify their claims, but predicate their computations on a growing market for the existing uses of perlite and the development of new uses.

Evidence introduced at the hearings was that the total demand for crude perlite in 1956 was in the neighborhood of 310,000 tons, an increase over the 1955 figure of about 15 percent, and the increase in demand for crude perlite for 1957 was estimated to be about 12 percent.¹¹

The claimants estimated that they would produce 60,000 tons in their first year of operation and 104,000 tons in the second year and, although they realized that their estimate of the amount of perlite which would be processed in the crushing plant in the first year of its operation would be just under $\frac{1}{5}$ of the total demand and their production for the second year of operation would be somewhat more than $\frac{1}{3}$ of the total national market, they expressed the opinion that, with the research still going on in the field of perlite use, they could capture a substantial part not only of the present market but of the market to be developed in the future (1957 Tr. 242-244).

One of the contestees' witnesses stated further that the proposed plant would "produce products which are not now on the market, and while we would obviously attempt to secure a certain portion of the established markets for plaster aggregate and concrete aggregate, which are the bulk of use at this time, the purpose after all, of the research which has been carried out for the account of Peerless Oil and Gas Company, has been to try to look ahead to the future to see

¹¹ This estimate of increased demand was not realized. The Bureau of Mines figures for the year 1957 show that the amount of crude perlite sold in that year was only 301,000 tons. In 1958, the total amount sold dropped to 292,000 tons. See Bureau of Mines Bulletin 585 (fn. 6).

The 1963 *Minerals Yearbook* of the Bureau of Mines, Vol. 1, contains a table of crude and expanded perlite produced and sold or used by producers in the United States. This table shows that the 1954-58 average of crude perlite sold and used was 282,000 tons. The table also shows that the total quantity sold and used reached a high of 325,000 tons in 1959. In the following year it dropped to 312,000 tons and in 1961 to 310,000 tons. In 1962 it increased to 320,000 tons and in 1963 it again reached the 1959 high of 325,000 tons. The quantity of crude perlite mined is shown by this same table to have reached a high of 443,000 tons in 1959 and to have decreased from then to 404,000 tons in 1963. In 1963 the average value of crude perlite crushed, cleaned, and sized, f.o.b. producer's plant, sold to expanders was \$8.05 per short ton, compared with \$8.14 in 1962.

The 1965 *Minerals Yearbook*, Vol. 1, carries a similar table and shows that the total quantity of crude perlite used and sold was 350,000 tons in 1964 and 392,000 tons in 1965, that the quantity of crude perlite mined was 427,000 tons in 1964 and 502,000 tons in 1965. The average value of perlite was \$8.74 in 1964 and dropped to \$7.49 in 1965.

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what our chances are for new commodities. Those commodities, we believe, will command prices somewhat higher than the existing average price * * * (1957 Tr. 368).

It is not enough to justify the issuance of patents to these 16 claims to show that a demand for the products of these claims may be developed in the future. What must be shown is that at the present time there is an existing market and that there is a reasonable justification for believing that the product of each claim can be disposed of in that market at a profit.

Have the contestees made such a showing? It is plain that there is now an existing market for crude perlite and that the market increased to some extent in the years between the first and second hearing and has grown even more since then. Thus, the contestees' expectations, while somewhat roseate, were not entirely visionary. Along with the increase in production, there occurred, as shown in the *Minerals Yearbooks* of the Bureau of Mines of this Department, an increase in the number of companies operating perlite mines and the number of mines in production. From 11 companies operating 14 mines in 1955, the number has grown to 17 companies operating 18 mines in 1965. New Mexico was by far the largest producing state, amassing 84 percent of total production in 1965, as compared to 44 percent in 1955.

The *Minerals Yearbooks* note that several new mines and mills have been placed in operation. In 1958, for example, a mine and mill near Tres Piedras, Taos County, New Mexico, began to process 250 tons per eight hour shift. The article remarks that this was the third plant established in the area. In the same year Johns-Manville Corporation of New York acquired all the stock of F. E. Schindler and Co., which owned and operated, the report says, the largest perlite mines and mills at No Agua, New Mexico.

According to the 1962 survey, a new perlite processing plant was being tested at Magdalena, New Mexico, with a crushing and screening capacity of 250 tons per day. In 1961, however, the Great Lakes Carbon Corporation closed its plant at Socorro, New Mexico.

There is nothing in the record to indicate that the perlite deposits on contestees' mining claims suffer any particular and specific disadvantages which would render their exploitation markedly less likely of success than others in New Mexico.

These statistics demonstrate, it seems to us, that although perlite mining and processing did not offer a sudden and spectacular pathway to success, it did and does offer an opportunity for the investment of labor and capital with a reasonable prospect that the mineral pro-

duced can be disposed of in the market at a profit, assuming, of course, that the costs are not excessive.

In this case, in view of the costs found by the hearing examiner and not seriously disputed by the contestant, it would appear theoretically that there is a reasonable prospect that some of the perlite from contestees' claims could be marketed at a profit. It does not follow, however, that a valid discovery can be said to have been made on all the claims. The difficulty arises from the great disproportion between the production planned by the contestees, assuming it could be marketed successfully, and the reserves of perlite in the claims.

To be more specific, the claimants are applying for patents to over 2,300 acres of land containing at least 25 million tons of perlite. At the rate of 392,000 tons of perlite per year, which is the highest annual amount sold through 1965 (see footnote 11), the claims could supply the total national demand for over 63 years. However, the claimants have estimated operating costs based on production at the rate of 104,000 tons, beginning with the second year (1957 Tr. 243). At this rate there is enough perlite on the claims for 240 years of operation. When it was pointed out to the claimants that 104,000 tons represented over one-third of the national production and consumption for 1956, they seemed to concede that they could not capture that extent of the market from existing producers but only part of it, the remainder of their production going to satisfy anticipated increased demand (1957 Tr. 243).

If a patent were to issue for all the claims, it is extremely unlikely that the claimants would, or could economically, exploit most of them for years to come. The result would be that instead of fostering the development of mineral resources a patent would merely place public lands in private hands and make them no longer available for other disposition or public use.

Essentially the same situation, involving the fact that only some of the mineral deposits could be marketed from claims in an area in which there was a tremendous number of similar deposits, was discussed in a recent case. In affirming a Departmental decision holding certain sand and gravel claims invalid, the court first remarked that there were in excess of 800 sand and gravel claims encompassing 100,000 or more acres in the Las Vegas area and then said:

If we were to judge the case solely on the basis of the conflicting evidence bearing upon the theoretical marketability of the sand and gravel from the Bradford Claims, we would be inclined to agree with the Hearings Officer rather than the Secretary * * *. But the record discloses a situation where, if the Bradford Claims could be sustained on the hypothetical and speculative opinion evidence relied upon by the plaintiffs, each of the claims in the valley

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comprising over 100,000 acres might be separately validated on the same sort of theoretical evidence. The end result would be that 100,000 acres of public lands would have been patented as valuable for mining, where it is evident and shown by the record that not more than one percent of the material might have been marketable in the reasonably foreseeable future.

* * * * *

* * * Sand and gravel of the same general quality found in the Bradford Claims is readily available in thousands of adjoining acres. The burden of the proponent, plaintiffs here, is not simply to preponderate in the evidence produced, its burden is to produce a preponderance of *credible* evidence, and the trier of fact is not required to believe or to give weight to testimony which is inherently incredible. It is apparent from the evidence that if, in June 1952, owners of other claims near Las Vegas had commenced to produce and market sand and gravel from their properties, such action would have filled the theoretical void in the supply of the material to the Las Vegas market, rendering the Bradford Claims valueless. The plaintiffs failed to enter the race to supply the theoretical insufficiency of production of sand and gravel. If they had done so successfully, they would have satisfied the requirements of *Foster v. Seaton* (*supra*) [271 F. 2d 836 (D.C. Cir. 1959)] by providing bona fides of development and present demand. Their failure so to act contradicts the speculative, hypothetical and theoretical testimony on which they rely. *Osborne v. Hammitt*, Civil No. 414, United States District Court for the District of Nevada, August 19, 1964.

While contestees' claims cover only 2,300 acres and not 100,000, the disproportion between the reserves of perlite on the claims and the market for perlite in the country as a whole, let alone that market in which the contestees could reasonably expect to sell, is similar enough to make the court's observations pertinent and, indeed, controlling.

It is difficult to see how the purposes of the mining laws would be accomplished by patenting all the mining claims, and thus depriving the United States and the public of any other use of the land, when there is no reasonable probability or even possibility that more than a fraction of the deposits could be exploited within the reasonably foreseeable future, even making allowance for the reserves necessary to sustain a mining operation. Justification exists only for holding valid those claims which would supply contestees with the deposits necessary to carry on an operation of the size they contemplate for a reasonable period of time, for in a hard economic sense only those deposits have a reasonable prospect of a market.

The claims, as we have noted, lie in two groups, one the Canovas within the national forest some 25 miles from the railroad, and the other, the Popolite and Pearl claims, outside the forest and about 18 miles from the shipping point. The road haul from the Pearl-Popolite claims is not only shorter, less expensive (\$1.60-\$1.55 versus \$2 per ton), but the road is practically free of excessive grades (1963 Tr. 14). They also contain 3,000,000 tons of pumiceous type perlite, a type com-

prising the largest tonnage on the Canovas claims (1957 Tr., Contests Nos. 54 and 55, pp. 24, 25). The only difference between the two groups of claims, contestees' witness said, is the shorter haul from and the absence of any glassy perlite in the Pearl-Popolite claims (*Id.* 24, 26).

Assuming that the contestees can produce and market 100,000 tons of crude perlite per year, the Pearl-Popolite claims would furnish sufficient raw material for 30 years of operation. Since the contestees used a 10-year period for amortizing their capital investment to estimate their operating costs (Contestees' Ex. 7, 1957 hearing), a 30-year reserve gives them ample leeway to recoup their investment and should not inhibit them from achieving the scope of operations they propose.¹²

The only objection to limiting contestees to the Pearl-Popolite claims is that they do not contain any of the glassy perlite deposits. While there was evidence that it would be advantageous to an operation to have available both types of deposits, there is no indication that an operation could not be successful without a glassy deposit or that the expanders could not use the pumiceous type. In fact Contestees' Ex. 8 (1957 hearing) concludes that crushing and expanding tests carried out in a commercial expanding plant on both types of deposits showed that the pumiceous ore "is more versatile than the glassy type" and that the glassy ore "is responsive but not so much so as the pumiceous ore." Thus, a successful mining operation should be possible even in the absence of glassy perlite deposits.

In the circumstances, then, we conclude that only the Pearl and Popolite claims are valid claims within the meaning of the mining laws.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision of the hearing examiner is affirmed as to the Canovas claims and reversed as to the Pearl and Popolite claims and the case is remanded for further proceedings consistent with this decision.

FRANK J. BARRY,
Solicitor.

¹² While it is not directly stated, the record also indicates that the contestees, or their assigns, are the mineral lessees of a large area of granted lands lying north of the two groups of claims and connecting them. (1957 Tr. 36; Contestees' Ex. 1). The contestees' attorney said in explanation of the markings on a map showing the mining claims: "The area marked in blue is the area on which the contestees have made patent application. * * * The ground marked in red is held by the mineral applicants as unpatented mining claims without patent application. The area in yellow is on the land grant and it is held under lease for perlite from the owners. * * *" *Id.* 37. The record is replete with references to the existence of perlite deposits in the area near the claims. *Id.* 16, 30, 53, 100-101. If the contestees are also the lessees of the abutting private lands, there would appear to be even more reserves available to them.

APPEAL OF ORNDORFF CONSTRUCTION COMPANY, INC.

IBCA-372

Decided October 25, 1967

**Contracts: Construction and Operation: General Rules of Construction—
Contracts: Construction and Operation: Actions of Parties—Contracts:
Construction and Operation: Changes and Extras**

Under a contract for construction of a Visitor Center including a Rotunda and office wing, containing a special clause for precedence of work on the Rotunda over the work in other areas "if at all possible," but without otherwise requiring any order of sequence of the work, where the work on the Rotunda was delayed during investigation of foundation conditions in the Rotunda area, and where in the meantime the contractor was directed to proceed with work on the office wing but failed to do so until it was able to commence work on the Rotunda, and after which time the contractor worked concurrently in both areas, the actions of the parties and the interpretation of the contract as a whole do not support a claim for additional compensation based on an alleged change in the sequence of the contractor's operations.

Contracts: Performance or Default: Suspension of Work—Contracts: Performance or Default: Compensable Delays—Contracts: Disputes and Remedies: Jurisdiction—Contracts: Construction and Operation: Drawings and Specifications—Rules of Practice: Appeals: Dismissal

Where delays occur in the performance of the contractor's work pending decisions by the Government on questions concerning drawings and specifications, due to alleged lack of Government supervision, or because of the actions of other contractors, an appeal based on such claims will be dismissed as being outside the Board's jurisdiction, in the absence of a contract provision of the "pay for delay" type.

Contracts: Construction and Operation: Changed Conditions—Contracts: Performance or Default: Release and Settlement—Contracts: Construction and Operation: Modification of Contracts—Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal

Under a contract modifications agreement for equitable adjustment purporting to settle and release claims presented by the contractor as additional expenses of coping with conditions encountered in constructing foundations of a building, an appeal based on the allegation that the contractor is entitled to additional compensation, for the reason that the conditions so encountered were alleged to be changed conditions, will be dismissed, since the Board has no authority to reform a contract.

Contracts: Construction and Operation: Notices—Contracts: Performance or Default: Compensable Delays—Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal

A claim for additional compensation based on alleged unreasonable delay by the Government in issuing a notice to proceed will be dismissed as being outside the jurisdiction of the Board.

Contracts: Formation and Validity: Mistakes—Contracts: Disputes and Remedies: Jurisdiction—Rules of Practice: Appeals: Dismissal

A mistake-in-bid claim previously ruled upon adversely by the Comptroller General was dismissed by the Board since, irrespective of the legal theory relied upon (e.g., the Law of Restitution and particularly the theory of Unjust Enrichment), the Board is without jurisdiction in the matter.

BOARD OF CONTRACT APPEALS

The twenty-one claims involved in this appeal grew out of the contract for the construction of the Visitor Center and Cyclorama Building at Gettysburg, Pennsylvania.¹ Property computed the claims asserted total \$165,735.22.² With relatively few and minor exceptions, the costs involved in the various claim items were not segregated during the course of contract performance and cannot be separated now.³ At the hearing (Tr. 5, 81) and in the post-hearing brief (pp. 78-80), the appellant also asserted a claim of mistake in bid in the amount of \$14,004.

The contracting officer found⁴ that claims totaling \$134,741.91 were beyond his jurisdiction.⁵ All of the remaining claims were denied

¹ The claim as initially filed on June 12, 1961 (Findings, Exhibit No. 1) comprised twenty-two claims. Claim No. 12 in the amount of \$105.80 was found to have been incorporated in a change order and was deleted by the supplemental data forwarded with the letter from appellant's counsel dated July 10, 1962 (Findings, Exhibit S-5).

² The amount shown is \$3,065.46 more than the \$162,669.76 claimed in appellant's post-hearing brief at page 9. This results from the fact that the \$3,066.06 reduction offered on Claim No. 1 was subject to a condition which has not been satisfied and the credit offered on Claim No. 13 for labor costs duplicated elsewhere was inadvertently understated by \$0.60.

³ The exceptions involve Claim Nos. 7, 8, 9, 10, 11, 15 and 16 (appellant's post-hearing brief, pp. 14, 72) in the aggregate amount of \$6,506.93. As to the balance of the claim items appellant's counsel states: " * * * one aspect has led to another and the impact of the change of the building location, the delays due to discrepancies, the Government's delays and the delays of the independent contractors are so interwoven that it is almost impossible to separate and segregate the consequences of each of these items. All are interrelated, all caused expense, all caused delay and all reacted to the detriment of the contractor * * *" (Appellant's post-hearing brief, pp. 14, 15). In view of the conclusions reached by the Board in its decision on all questions of liability, it will not be necessary for us to wrestle with the formidable problems involved in determining the proper amount of an equitable adjustment in cases where the claims asserted are presented on the total cost basis.

⁴ The Findings of Fact include 116 Exhibits as attachments. The findings refer to the Specifications as Exhibit "A" and to the Drawings as Exhibit "B." These documents are voluminous and are not physically attached to the findings, although they are part of the appeal file. Also part of the appeal file are the documents referred to in Summary of Conference memorandum of October 10, 1963 and the three documents added to the record at the request of appellant's counsel in his letter of December 5, 1963. Unless otherwise indicated, all references to Exhibits are to those which are attached to or referred to in the findings.

⁵ Involved in this determination are Claim Nos. 19, 20, 21 and 22. As to each of these the findings state: " * * * At best, the claim is for unliquidated damages for breach of contract, and the Contracting Officer is unable to answer to the merits of the claim" (Findings, pp. 66-67).

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on various grounds. In the appeal from this decision appellant's counsel stated that the Findings of Fact were erroneous because the contracting officer had failed to perceive that appellant's entire claim (except for a few miscellaneous items of a minor nature) was based upon changed conditions occurring at the outset of the project.⁶ The notice of appeal concluded by requesting a hearing.⁷

Government Counsel moved to dismiss the entire appeal as outside the jurisdiction of the Board on the grounds that all of the items of claim purported to be based upon Government delays or upon the failure of the Government to otherwise discharge its obligations under the contract. Following an informal conference on October 4, 1963, at which a member of the Board (now deceased) presided, the appellant submitted a brief in opposition to the Government's motion to dismiss.⁸ In the brief appellant's counsel acknowledged that jurisdictional questions existed as to all of the principal claim items.⁹ The claims not considered to present jurisdictional questions totaled \$451.25.¹⁰ By an interlocutory decision dated September 10, 1964, the Board denied the Government's motion to dismiss the entire appeal, noting that the appellant had requested a hearing and that there were issues of fact involved.¹¹

Subsequently, a hearing was held at which evidence was presented on all matters involved in the dispute.¹² Following the hearing, the

⁶ " * * * the changed conditions occurred in the following manner: Subsequent to the advertising of the project for bids and prior to the opening of the bids, the government without notice to the bidders, changed the location of the structure a distance of 20 feet from the location upon which the foundation design was predicated. As a result of this change, the foundation conditions actually encountered differed substantially from those contemplated in the original contract. These changed conditions required a complete review of the foundation conditions and a complete re-exploration, coupled with a redesign of a substantial portion of the foundation. As a direct result of this, the project was at a standstill from December 11, 1959 until January 25, 1960 * * * "

⁷ The counsel who signed the notice of appeal and who prosecuted the appeal during the early stages is not the present counsel who was retained on or about August 3, 1964.

⁸ The brief in opposition was forwarded by appellant's former counsel, Joseph J. Laws, under date of December 5, 1963.

⁹ " * * * Claim Nos. 8, 12, 15, 16 and 17 are conventional claims for items of extra work performed at the express or implied request of the agency and are clearly within the jurisdiction of your Honorable Board for determination of their merits in light of the technical or substantive defenses that may be asserted by the agency * * * " (Brief of Claimant to Reply to Government's Motion to Dismiss, p. 2).

¹⁰ This does not include the \$105.80 involved in Claim No. 12 which had previously been withdrawn, note 1, *supra*.

¹¹ IBCA-372 (September 10, 1964), 1964 BCA par. 4418.

¹² The hearing was held in Gettysburg, Pennsylvania, in May of 1965. At the hearing various exhibits were offered in evidence consisting of appellant's Exhibits "A" through "J" and Government Exhibits I through 11. Of particular interest are appellant's Exhibit "J", a volume of diary entries of Willard Verbitsky, the appellant's job superintendent; Government Exhibit No. 3, a volume of diary entries and other reports by Thaddeus Longstreth, Architect and Eastern representative of the firm of Neutra and Alexander; and Government Exhibit No. 11, three volumes of diary entries of David O. Smith, the project supervisor for the Government on the job.

appellant submitted a brief in which it appears to have abandoned not only the claim of changed conditions¹³ but also the assertion of any claim under the contract, as is well illustrated by the following passage:

Turning to a necessarily brief summary of the law, we contend that this claim could be approved either on the theory of breach of contract or on the theory of restitution predicated upon quantum meruit. (Post-hearing brief, p. 84).

For its part the Government again moved to dismiss all items involved in the appeal on the ground that they are, without exception, claims for breach of contract.

Contrary to the legal theories upon which appellant appears to be proceeding, the Board's jurisdiction is of a limited nature.¹⁴ The Board has said that our "power to grant relief must be found within the 'four corners' of the contract."¹⁵ Stated differently, unless the contract itself prescribes a remedy for the type of wrong alleged, we are without any authority to pass upon the merits of the claim or claims asserted.¹⁶ The fact that an appellant has characterized its claim as for breach of contract will not defeat our jurisdiction, however, if there is a contract provision under which relief of the type sought may, upon a proper showing, be provided.¹⁷ The appellant's view of the matter is of some weight, nonetheless, and is a factor to be considered in determining the question of our jurisdiction.¹⁸

Before proceeding to consider the serious jurisdictional questions presented, we shall undertake to set forth the chronological history of contract performance with special emphasis upon the crucial early months. Incident to such endeavor we shall advert to and quote from the contract provisions relied upon by the parties or having particular application to the resolution of the issues in dispute. We shall also examine the appellant's claim of changed conditions and its other principal contentions, as well as the Government's position respecting these several matters. We will conclude our opinion by passing upon (i) each of the twenty-one claims set forth in the letter of July 10, 1962 (Exhibit S-5) and (ii) the mistake-in-bid claim.

¹³ In the appellant's post-hearing brief no attempt is made to show the application of the language of the Changed Conditions clause to the evidence presented. In fact, there is no reference to the clause in the entire brief.

¹⁴ *United States v. Utah Construction and Mining Co.*, 384 U.S. 394 (1966).

¹⁵ *Peter Kiewit Sons' Company*, IBCA-405 (March 13, 1964), 1964 BCA par. 4141.

¹⁶ *American Cement Corporation*, IBCA-496-5-65 and IBCA-578-7-66 (September 21, 1966), 73 I.D. 266, 66-2 BCA par. 5849, on reconsideration, 74 I.D. 15, 66-2 BCA par. 6065.

¹⁷ *Simmel-Industrie Meccaniche Societa Per Azioni*, ASBCA No. 6141, 61-1 BCA par. 2917.

¹⁸ *American Cement Corporation*, note 16, *supra*.

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Background

On September 30, 1959, the contractor was awarded the contract (Exhibit No. 2), which called for the construction of a Visitor Center and Cyclorama Building at Gettysburg, Pennsylvania. The award was made on the basis of the unit prices submitted for an estimated contract price of \$687,349.¹⁹ Work was scheduled to commence within ten calendar days and to be completed within three hundred sixty days after the date of the notice to proceed. Being in excess of \$200,000 in amount, the contract was subject to approval by the Director of the National Park Service (Exhibit No. 6). It was approved by the Assistant Director on October 19, 1959 (Exhibit No. 2).

The notice to proceed was not issued, however, until November 16, 1959 (Exhibit No. 3).²⁰ It was acknowledged by the contractor on November 17, 1959 (Exhibit No. 4), establishing November 18, 1959 as the first calendar day of the contract period and November 11, 1960, as the completion date for contract performance (Exhibit No. 5). During the course of contract performance, a total of twenty-five change orders were issued which increased the contract price in the amount of \$49,515.96 (Findings, p. 42) and extended the time of contract performance to January 10, 1962, the date the building was accepted subject to completion of certain punch list items (Findings, p. 35, Change Order No. 24). As a result of the time extensions granted the contractor, no liquidated damages were assessed for delayed performance.

The contract incorporated the General Provisions of U.S. Standard Form 23A (March 1953 Edition) and provided for the work to be performed in accordance with the Specifications (Exhibit A) and the Drawings (Exhibit B), both bearing date of June 1, 1959 and both prepared by the firm of Richard J. Neutra and Robert E. Alexander,

¹⁹ The contractor's bid was the lowest of the bids opened on September 29, 1959, giving effect to the work involved in alternates to the base bid which the Government elected to have performed. Orndorff Construction Company, Inc., had engaged in construction work since December of 1957, with Brickley S. Orndorff serving as both President and Director of the Company (Tr. 12, 13). There is nothing in the record to indicate that the Company had previously had any experience on a project of a magnitude comparable to that involved here.

²⁰ A letter of November 3, 1959, from a Government employee, Mr. John B. Cabot, supervising architect, Eastern Office, Division of Design and Construction, Philadelphia, Pennsylvania, to Messrs. Neutra and Alexander, states: " * * * Though Orndorff Construction Company has been notified that their contract is approved and have immediately started placing orders for materials, they have advised Superintendent Myers that steel procurement is particularly critical. Because of this, the Superintendent will not issue a notice to proceed until around the middle of the month. * * * " (Exhibit No. A-1).

architects, of Los Angeles, California, as called for by their contract with the National Park Service. Under Article VIII of this contract the Government had the option to require the firm to furnish supervision for the project. This it did as is reflected in Change Order No. 1 dated October 20, 1959.²¹ Under the terms of the change order the architects were required to (i) provide complete supervision of construction in accordance with the plans and specifications, additive alternates and contract documents; (ii) be represented in the East by a registered architect who would be sufficiently familiar with the work to permit the ready answers of questions received from the contractor or the Government during the course of contract performance and who was also scheduled to make weekly trips to the job;²² and (iii) make trips as required by the contracting officer to the site of construction during the progress of the work. Elsewhere we have commented upon the terms of the agreement and upon the provisions of Change Order No. 1 in somewhat greater detail.²³ The provisions of appellant's contract are compatible with the exercise of supervision by architects over the project, as is considered to be evidenced by Article 28, "Interpretation of Terms,"²⁴ Article 41, "The Architect's Status,"²⁵

²¹ Change Order No. 1 has been added to the appeal record as requested by appellant's counsel in his letter of December 5, 1963.

²² For their representative in the East the architects selected Thaddeus Longstreth, of Princeton, New Jersey, who during contract performance made 98 trips to the project site (Government Exhibit No. 3).

²³ See *Richard J. Neutra and Robert E. Alexander*, IBCA-408 (October 16, 1964), 71 I.D. 375, 1964 BCA par. 4485.

²⁴ "ART. 28. INTERPRETATION OF TERMS:

"The following Article augments Article 1 of Standard Form 23A:

"A. *Architect* shall mean Richard J. Neutra and Robert E. Alexander, or their authorized representative.

"B. *Job Supervisor* shall mean an employee of the Architects stationed on the job and/or a technically qualified employee of the Government stationed on the job either or both so employed for the specific purpose of supervision.

"C. *Owner* shall mean the U.S. Government particularly represented by The National Park Service, U.S. Department of Interior as the first party of the contract.

"D. *Contracting Officer* shall mean the administrative representative of the Government; in this instance, the Superintendent of Gettysburg National Military Park, his successor or those authorized to represent him.

"E. The term '*General Contractor*' or '*Contractor*' as used herein shall mean the second party of the contract * * *.

* * *
"H. *Common expressions* hereinafter used shall be interpreted to have the following significance:

"(1) '*Or Equal*' shall mean 'or equal in the opinion of the Architect.'

"(2) '*Approved*' shall mean 'approved in writing by the Architect.'

"(3) '*If (when/as) directed*' shall mean 'if (when/as) required by the best building practice' and/or 'if (when/as) required by the Architect.'

* * * * *

²⁵ "ART. 41. THE ARCHITECT'S STATUS:

"A. In all phases of the technical and architectural execution of these Contract Documents, the decision of the Architect shall be final. Technical and architectural approval shall remain the vested interest of the Architect. Decisions of the Architect will be trans-

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and Article 42, The Architect's Decisions²⁶ of the General Provisions.

The pre-construction conference was held on November 20, 1959.²⁷ The contractor was represented by Brickley Orndorff, President, Willie Verbitsky, Superintendent, and other officials, while among the other conferees were James B. Myers, Superintendent and Contracting Officer, S. O. Sollenberger, Assistant Superintendent, David O. Smith, Project Supervisor, and Thaddeus Longstreth, Architect.²⁸ The parties were in accord that any discrepancies discovered in the drawings and specifications were to be brought to the attention of Mr. Longstreth in letter form and that all proposals for change orders were to be forwarded to Neutra and Alexander initially with final decision to be made by the Government (V (11/20/59), Appellant's Exhibit "J"). Another significant entry on that date contains the first reference to the relocation of the building.²⁹ On Monday, November 23, 1959, the Project Supervisor gave the contractor's job superintendent the dimensions and elevations required for establishing the revised location of the building (S (11/23/59), Government Exhibit No. 11), and on December 1, 1959, the superintendent proceeded with the layout of the work (Tr. 425, 426).

Meanwhile, on November 24, 1959, the project supervisor addressed a letter to Mr. Longstreth³⁰ concerning anticipated problems on the

mitted, in writing, by the Contracting Officer. General Supervision will be performed by the Architect. Daily Supervision may be performed either by the Architect or by a technically qualified employee of the Government. If, in the opinion of those performing the supervision, it is necessary to stop the work in order to insure compliance with the Contract Documents and protect the interests of the Government, the supervisor, his superior, and the Architect all have the proper authority.

* * * * *

²⁶ "ART. 42. THE ARCHITECT'S DECISIONS:

"The Architect shall be the sole judge of the true intent of the Drawings and Specifications, of the Details, of the quality of all work done and all materials furnished in performance of the Contract of the amount of work done, and all amounts of monies, due under this Contract. His decisions relative to any of said matters shall be binding and conclusive upon both parties thereto, and he shall have the power to condemn any work or materials which shall be deemed by him not to conform with requirements of the Contract."

²⁷ See Verbitsky's diary (Appellant's Exhibit "J") for a copy of minutes of conference.

²⁸ Messrs. Verbitsky, Smith and Longstreth all maintained diaries in which were recorded events transpiring on the job either the same day they occurred or the succeeding day. With only one or two exceptions the witnesses for both parties testified in generalities or read excerpts from some or all of the diaries at the behest of Counsel. The diaries assume an importance, therefore, that they might otherwise not possess. As they will be frequently cited in the course of this opinion, references to particular entries will appear in parentheses enclosing the first letter of the surname of the author, the date, and identification of the exhibit where the entry may be found.

²⁹ "Contractor asked if the location of the building as indicated by the pivot stake of the Cyclorama has been moved from the location that prevailed at the time of his inspection of the site prior to bidding. Mr. Sollenberger said that the building had been moved. The contractor stated that this would require additional backfill, referring to the bank of earth west of the building that had been cut down prior to change in location of building." (S (11/20/59), Government Exhibit No. 11).

³⁰ Added to the appeal file pursuant to letter request from appellant's counsel dated December 5, 1963.

job.³¹ The same day the project supervisor also wrote the contractor requesting unit prices on various items of work in anticipation of increases and decreases in depths of footings and changes in size (Exhibit C-4c). These were furnished by the contractor's letter of December 2, 1959 (Exhibit C-4b).

Throughout late November and continuing into early December, the contractor's superintendent periodically informed the project supervisor that the contractor would be unable to accomplish any substantial work until the site preparation contractor, Maitland Construction Company had completed its excavation work, including the removal of rock adjacent to the Cyclorama (V. (11/23/59—12/4/59), Appellant's Exhibit "J"). Removal of the rock in question was completed on December 5, 1959 (S. (12/10/59), Government Exhibit No. 11). The record clearly indicates that the delay in the commencement of work during this time was not due to any doubt on the contractor's part as to the location of the building on the project site.³²

Actual construction did not commence until December 10, 1959, when the contractor started excavating for footings "X" and "U" in the Cyclorama area with a power shovel (S. (12/10/59), Government Exhibit No. 11). The following day the superintendent (having excavated to an outcropping of rock at elevation 592) was preparing to place forms for column "X" when the project supervisor told him that the rock would have to be exposed in order to determine if it was solid rock or just boulders. When the superintendent protested the job supervisor drew his attention to the requirements of the specifications that bottoms of all footings should be level and on solid rock.³³ They

³¹ Of particular interest in the following: " * * * If you remember when you were here, mention was made that the building had been moved 10 feet east from the location shown on the contractor's drawings. Is it considered likely that this would effect [sic] the foundation conditions to the extent that a review would need to be made of the entire foundation design? We request specifically, as the first item of work, whether the contractor should be instructed to proceed with his pile driving as shown on the drawings or to excavate for the footings that are indicated to bear on rock."

³² "Apparently the hub of the Cyclorama Building was moved from a point originally shown on the drawings, however, the point now established, in accordance with Mr. Smith, is final and further a bench mark established which is noted on our field drawings." (Contractor's letter of November 27, 1959, Exhibit C-5).

³³ "A. Bottoms of all footings, excavations shall be level, composed of undisturbed natural soil or work [sic], at the minimum depths shown, * * *."

"B. Those footings which are specifically marked on the drawings, shall extend to sound rock. The bottom elevations shown for these footings are estimated and shall serve as the basis for the bid. For changes of more than 1'-0" in these elevations, an additive or deductive change shall be made in the Contract Price for that portion of the change which exceeds 1'-0"."

"(1) The Contractor shall carry a minimum size excavation to the elevation shown, unless rock is encountered at a higher elevation. If no rock is encountered at the estimated elevation, a sounding rod shall be driven on down to rock or to refusal in several locations within the footing area. The Architect shall be notified of the result of the sounding immediately and will instruct the Contractor how to proceed * * *." (ART. 6. Structural Excavation, Division 2, Earthwork and Grading, Specifications, p. 2-2, Exhibit "A").

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also discussed exposing as many areas for footings as possible for inspection by the engineers from the West Coast when they came to observe the test-pile driving (S (12/11/59), Government Exhibit No. 11).

At various times the appellant has referred to the project supervisor's action described above as a direction to stop work (Tr. 120) or as a direction to "suspend operations" which impliedly continued in effect from December 11, 1959 to January 25, 1960.³⁴ This view of the matter is without support in the record. It appears that when the project supervisor was confronted with the questionable footing conditions at Column "X", he directed a temporary suspension of all work.³⁵ These directions were withdrawn, however, either the same day or upon the succeeding day (S (1/15/60), Government Exhibit No. 11). Apparently, they were withdrawn before the contractor's superintendent recorded the event in his job diary for he states: " * * * Informed by Smith he would not accept bottom of exc. as it was not 'level' and not sufficiently 'sound' or 'solid' for bearing. Informed me to discontinue work in this Column Footing and Footings of Columns 'M', 'N', 'O', 'P', 'Q' and 'U' until same could be inspected by architects who would be on job Dec. 17, 1959. This causing delay in forming and placing of first concrete on job. * * *" (V (12/11/59) Appellant's Exhibit "J"). In fact, excavations for other "footers" (footings) in the Cyclorama area were made during the period in question (Tr. 492, 493) and other work continued in that area and in an adjacent area (Tr. 496, 502).

Pending the completion of the foundation investigation and the receipt of revised design for certain of the footers, however, the con-

³⁴ "On December 11, 1959, four days after commencement of the work, the contractor was directed to suspend operations until a determination of remedial measure could be made by the architect. Despite repeated urgings by the contractor, the design revisions were not made available to the contractor until January 25, 1960, * * *. In other words, no effective start was or could be made on performance of the contract * * *" (Claim letter of June 12, 1961, p. 3, Exhibit No. 1).

³⁵ The project supervisor apparently acted under his authority to enforce compliance with the specification requirements and particularly the requirements of Article 6, note 33, *supra*. The contract specifically vested the contracting officer with authority to temporarily suspend work, stating: "The Contracting Officer shall have the authority to suspend the work, wholly or in part, for such period as he may deem to the best interest of the Government due to conditions which are considered unfavorable to the suitable prosecution of the work, or for failure on the part of the Contractor to carry out orders given or to perform any provision of the contract. The Contractor shall immediately respect the written order of the Contracting Officer to suspend the work wholly or in part. The Contractor shall not suspend work without such written authority, and shall immediately resume work when conditions are favorable or when methods have been corrected, as approved by the Contracting Officer in writing." (ART. 70, Temporary Suspension of Work, General Provisions, Specifications, p. A-24, Exhibit "A").

tractor was unquestionably hampered in his operations in the Cyclorama area.³⁶ The question that apparently arose then (S (1/15/60), Government Exhibit No. 11), and was raised later³⁷ was why the contractor did not proceed with the work in the area of the office wing of the building while the investigation of foundation conditions in the Cyclorama area were in progress. The contractor acknowledges that he was directed to proceed with work on the office wing during this period but explains the failure to do so on the ground that (i) the specification directed that the Cyclorama be done first;³⁸ (ii) it would cost money to change the phasing of the work; and (iii) the adverse conditions encountered in the Cyclorama area might also be present in the area involving the office wing and, consequently, they were reluctant to start (Tr. 125-128).

The contractor's reluctance to proceed with work on the office wing may have been due to doubts that the building location would remain the same. If so, these doubts should have been dispelled when during the course of the Stickel investigation of foundation conditions for the Cyclorama on December 29, 1959, the contractor's superintendent was unequivocally told that the building would remain as presently located (S (12/29/59) and (1/15/60), Government Exhibit No. 11). The contractor did not, in fact, commence work in the area of the office wing until early February of 1960 (Tr. 439, 496). This was after the contractor had received all of the information required for continuing with the work in the Cyclorama (Exhibit E-16). Throughout the remainder of the job the contractor worked his crew on both the Cyclorama and the office wing portion of the building with no apparent

³⁶ This is conceded in Mr. Longstreth's report for December 1959, Government Exhibit No. 3.

³⁷ The architects conclude their letter of March 3, 1960 to the project supervisor with the inquiry: "By the way, were any orders issued precluding progress on the office wing while this investigation was proceeding in the Rotunda?" (Exhibit F-2).

The contracting officer in addressing himself to this question in the findings states: "The foundation investigations were limited to the Cyclorama part of the building and during the time that the investigations were being made, there was nothing to prevent the contractor from proceeding with work on the office wing of the building. In fact, the Contractor was urged by the Project Supervisor to start work on the office wing but he chose not to do so." (Findings, p. 12).

³⁸ "The cyclorama painting, furnished and installed by the Government, is to be placed in the building as early as possible, as it will have to be reconditioned and extensively restored before it can be made a part of the public use of the building. For this reason, work on the Rotunda shall take precedence over the office wing and finish plastering and insulation of exterior walls, etc. shall be completed in the Cyclorama Room before any other areas if at all possible. It is estimated that at least 180 calendar days will be needed to install and restore the painting ready for public viewing. If at all possible, it is desired to have this work completed along with the building" (ART. 21, "Work And Material To Be Furnished By Others," Special Provisions, Specifications, p. B-6, Exhibit "A").

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attention to the expressed preference in the contract for the early completion of work in the Cyclorama (S (7/13/60) (8/26/60) (10/6/60) and (10/12/60), Government Exhibit No. 11, Tr. 128).

When Messrs. Neutra and Alexander visited the job site on December 17, 1959 and witnessed the test-pile driving,³⁹ they raised a question as to whether a heavier pile driver was needed for the work (NA-1 (12/17/59), Government Exhibit No. 3).⁴⁰ Later it was discovered that the contractor was using a lighter weight hammer for driving the piles than the 15,000 ft. lb. hammer required by the specifications (S (12/22/59), Government Exhibit No. 11).⁴¹

Initially the architects appear to have considered assuming responsibility for investigation of foundation conditions (NA-1 (12/17/59), Government Exhibit No. 3). All three diaries record Mr. Alexander's repudiation of this view of the matter in his telephone conversation of December 21, 1959, with Messrs. Longstreth and Smith in which Mr. Alexander stated that responsibility for the sub-surface conditions rested with the National Park Service and Mr. Stickel, the geologist who had made the test borings and the original report.

Mr. Stickel visited the job site on December 22, 1959. He noted the indeterminate nature of the sub-surface conditions and the rapid change from solid rock to diabase. Mr. Stickel found that the location of building varied from the location that he had used in making his test borings (S (12/22/59), Government Exhibit No. 11).

The design engineer for the architect, the project supervisor, and Mr. Stickel, were all in agreement that probing by the contractor below his excavations for the purpose of determining sub-surface conditions was inadequate to disclose sound rock, since the sounding rod might be stopped by a boulder which would be insufficient support for the building. The design engineer recommended the employment of Mr. Stickel for the purpose of making test borings (S (12/22/59), Government Exhibit No. 11).

³⁹ "The pile driving bid shall be based on a pile length of 25 feet. The length of piles to be ordered shall be determined by the Architect after two (2) test piles have been driven at locations shown on the drawings." (ART. 3, Lengths To Be Ordered, Division 2A, Piles, Specifications, p. 2A-1, Exhibit "A").

⁴⁰ "Piles shall be driven with a steam hammer developing not less than 15,000 foot/pounds of energy per blow. * * * No driving shall be done with an insufficient boiler or hammers. * * *" (ART. 5, Driving, Division 2A, Piles, Specifications, pp. 2A-1, 2A-2, Exhibit "A").

⁴¹ " * * Contractor drove initial test piles and informed us that specified penetration could not be attained. We subsequently learned that a 9,100 ft. lb. hammer had been used instead of 15,000 ft. lb. as specified. Contractor then claimed that piles would fail with 15,000 ft. lb. hammer. He later used 15,000 ft. lb. hammer, and obtained required penetration without damaging piles." (Architect's letter of June 30, 1961, Exhibit D-1).

On December 29, 1959, Mr. Stickel appeared on the job site with his crew and made 3 test borings that afternoon. In Mr. Stickel's view these test borings confirmed his opinion based on earlier test borings. The investigation continued on December 30, 1959, with additional test borings which confirmed Mr. Stickel's earlier opinion regarding the probable location of a deep diabase pit. On the following day Mr. Stickel made auger borings and a visual inspection at the bottoms of the footings. On January 4, 1960, the investigation concluded with Mr. Stickel making a personal investigation of each foundation condition after the contractor had cleaned out the bottoms of all of the excavated footings (S (12/29/59) (12/30/59) (12/31/59) and (1/4/60), Government Exhibit No. 11).

Following the conclusion of the investigation but on the same day Mr. Stickel and the project supervisor called the architects from Mr. Myers' office. Mr. Stickel summarized his findings and recommended that footings "J" and "U" be enlarged and that footing "Q" be changed from a spread type to a pile type. The architects advised that they would make no decision until they had had an opportunity to study Stickel's written report. They requested that the report covering his findings be sent air mail special delivery (S (1/4/60), Government Exhibit No. 11).

According to the contractor's superintendent, Mr. Stickel promised to mail the report to the architects the very next morning (V (1/4/60), Appellant's Exhibit "J"). On January 6, 1960, the superintendent advised Mr. Longstreth that Stickel's report had already been sent (L (1/6/60), Government Exhibit No. 3). The report was not, in fact, mailed until on or about January 12, 1960, and was not received by the architects until January 15, 1960 (S (1/12/60) (1/15/60), Government Exhibit No. 11).

Mr. Orndorff was on the job site on December 29, 1959, and participated in discussions with Mr. Stickel and the project supervisor concerning the conditions at the bottoms of the footings as brought to light by the excavations. He was reported to be disturbed by all of these studies and inquired as to whether they could continue to drive piles after two test piles were driven. As the contractor had not yet obtained the 15,000 ft. lb. hammer required by the specifications for driving piles (note 40, *supra*), the project supervisor appears to have regarded the question as somewhat of an academic nature. He assured the contractor, however, that an effort would be made to get an im-

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mediate decision if it should develop that the work was actually being held up.⁴²

Throughout most of January 1960, the job continued to be plagued by many of the problems which had impeded progress in the Cyclorama area during the preceding December. In a visit to the job on January 5, 1960, Mr. Orndorff advised that he would not order the pile driving equipment⁴³ until a final decision had been received from the architects as to (i) definite location of the building;⁴⁴ (ii) type of footing to be placed; and (iii) location and length of piles (Exhibit C-2a). Some time later Mr. Orndorff appears to have recognized that the results from driving the test piles was information the architects were entitled to have in reaching their decision (note 39, *supra*). In any event, pile driving equipment of the requisite power arrived on the job site on January 13, 1960 (V (1/13/60), Appellant's Exhibit "J"); driving of the two test piles at H and R footings was completed on January 15, 1960, and the results were immediately reported to the architects by telephone (S (1/14/60) (1/15/60), Government Exhibit No. 11). On the same day (Exhibit C-3), the architects were requested to authorize the contractor to proceed with pile or spread footings and to give telephonic notice on January 18, 1960.

The architects' decision was communicated to the Eastern Office of Design and Construction on January 18, 1960 (Exhibit C-4) and relayed to the contractor on the following day (S (1/19/60), Government Exhibit No. 11).⁴⁵ Drawing R-8 (1/19/60) Revision of Rotunda Foundation Plan, showing revised spread footings at locations "J" and "U" and a new pile footing at location "Q" was received by the contractor on January 22, 1960 (Exhibit E-16).

⁴² (S (12/29/59), Government Exhibit No. 11).

⁴³ The delay in placing the order was based upon the necessity of getting the pile driving equipment from Pittsburgh and the desire not to have it sitting idly by awaiting decisions of the architects.

⁴⁴ "When I told Don Nutt that Mr. Orndorff wished official notification regarding location of the building, he said that had been given in his telegram to me and that I could use that as the basis for notifying Mr. Orndorff by letter that the location as presently outlined will not be changed" (S (1/12/60), Government Exhibit No. 11). The telegram in question was apparently sent on December 29, 1959 (S (1/15/60), Government Exhibit No. 11).

⁴⁵ "Neutra and Alexander advises this date: 'Drive piles at all locations shown on plans plus a typical three pile footing at Column Q. Order piles 28 feet long and calculate load capacity per formula in specifications. (Penetration and resistance to settlement as important as load capacity.) * * * Redesign of J and U drawing to be sent 1/19. Remainder of spread footings okay, to pour as recommended by Stickel. Pour on uneven surface except not on general slope over 1 to 5.'" (Telegram of January 18, 1960 from John B. Cabot, supervising architect, to the project supervisor, Exhibit C-4).

Piles in the required length were promptly ordered by the contractor and pile driving was commenced on January 25, 1960,⁴⁶ and was completed on January 27, 1960 (L (1/27/60), Government Exhibit No. 3). Two days later the first concrete (involving pours of 14 cubic yards in several footings) was placed on the job (V (1/29/60), Appellant's Exhibit "J").

Questions concerning real or apparent discrepancies in the specifications were raised with Mr. Longstreth on each of his four visits to the job site during the month. Most of the questions were referred to the architects for decision (L (1/6/60) (1/13/60) (1/20/60) and (1/27/60), Government Exhibit No. 3). One of the questions raised by the contractor's superintendent related to construction joints for the drum (L (1/6/60), Government Exhibit No. 3). A question pertaining to construction joints had previously been raised with Mr. Longstreth (V (12/1/59), Appellant's Exhibit "J"). In a letter written under date of January 8, 1960, Mr. Orndorff advised the architects as to the construction joints planned for the main Cyclorama well (Exhibit No. 1a).⁴⁷ With work in the Cyclorama area greatly curtailed throughout most of December and January by reason of the investigation of the foundation conditions and with the contractor refusing to proceed with work in the area of the office wing, it does not appear that the contractor's operations at this time were materially affected by such delay as may have been involved in the architects answering the questions presented concerning specification discrepancies or omissions, including those relating to construction joints. In any event, it appears that in Mr. Longstreth's opinion there were no previously submitted questions unanswered at the conclusion of his visit to the job site on February 4, 1960.⁴⁸

On January 6, 1960, the contractor wrote the contracting officer to complain about the delays incident to the investigation of the foundation conditions in the Cyclorama area and to request an extension of time from December 11, 1959 (Government Exhibit No. 8). The content of this letter was subsequently discussed at a conference in which the contracting officer participated and an agreement was reached that the contractor would be entitled to an extension of time from December 11 until the time when formal instructions were given on how to

⁴⁶ (S (1/25/60), Government Exhibit No. 11).

⁴⁷ "Construction joints not indicated on the drawings shall not be used without the prior approval of the Architect. * * *" (ART. 14, Construction Joints, Division 3, Concrete, Specifications, p. 3-7, Exhibit "A").

⁴⁸ "Clarified all questions from past visits with Messrs. Smith and Verbitsky." (L (2/4/60), Government Exhibit No. 3).

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proceed with the foundations (S (1/14/60), Government Exhibit No. 11). During the month the contractor's superintendent became concerned about the possibility that resolution of the specification discrepancies might entail extra work and inquired of Mr. Longstreth as to the prospect for obtaining additional compensation. He also inquired of the project supervisor as to whether a revised grading plan could be obtained from him which would reflect the changes in grading and excavation attributable to moving the building location. In both instances he was referred to the architects (V (1/22/60) and (1/27/60), Appellant's Exhibit "J").

Only one percent of the work covered by the contract was accomplished in February 1960. This represented no improvement over the work accomplished in the preceding January (Monthly Progress Reports, Exhibit E-1). Nonetheless, by the end of February all of the footings had been poured in the area of the Cyclorama and most of the footings in the office wing had also been poured. The concrete delivered to the job having made a poor showing upon initial tests, various conferences were held and tests conducted in an effort to ascertain the cause of the difficulty (S (2/9/60) and (2/10/60), Government Exhibit No. 11). The first deficiency in the placement of concrete also was noted at this time (S (2/17/60), Government Exhibit No. 11). Serious problems attributable to the quality of the concrete⁴⁹ or the quality of supervision over its placement⁵⁰ continued to arise throughout most of the life of the project. The contracting officer described the appellant's haphazard operation, lack of supervision, and failure to meet the requirements of the specifications (Findings,

⁴⁹ "When concrete arrived on job * * * Willie finally rejected it as being too stony. This is the first time that he has taken direct action on the concrete. * * * (S (5/2/60), Government Exhibit No. 11.) * * * Call McDermitt concrete plant to inform them of concrete again being too 'stony' and if any more is delivered to job it will be returned and McDermitt will be held responsible for cold joints, partial wall pours, etc. * * * (V (8/23/60), Appellant's Exhibit "J").

⁵⁰ "I talked * * * with Mr. Ress about the concrete placing, pointing out to him the lack of supervision and effective workmanship * * *. I told him definitely I was dissatisfied with the placing of the reinforcing. * * * I told him they had better get their job organized immediately. * * * (S (4/8/60), Government Exhibit No. 11). "Mr. Orndorff arrived on the job late in the day and after inspecting the defective concrete asked my theory regarding it. I told him my contention had always been that the concrete was too harsh for easy working, and that it would pay him to look into the mix with a view to changing it for better work ability [sic]. However, the fault with the defective concrete was definitely lack of proper vibration. * * * I said the trouble with the placing of the concrete was that the workers were left to their own devices; that they were farmers that were picked up to do the job and did not know from experience how to place the concrete" (S (4/11/60), Government Exhibit No. 11). "Poor concrete at north end of west face of westerly ramp rail noted. Contractor to finish this in acceptable manner or replace work" (L (5/23/61), Government Exhibit No. 3).

pp. 44, 45); in addition, he commented as follows on corrective work that was found to be necessary:

One outstanding expense that added immeasurably to the excessive cost of the job was the correction of the concrete surfaces by grinding, cutting and patching. Major areas included under this heading included the entire exterior face of the cyclorama wall in preparation for painting; the face of the 16' radius wall in preparation for ceramic tile; the parapet walls of the exterior ramp to bring them into proper alignment; removal of top of auditorium wall to bring to elevation shown on drawings; work on the walls of the office wing to allow metal window frames to be set. The Project Supervisor's Log contains almost daily reference to this corrective work from March 1, 1961 to September 1, 1961. (Findings, p. 53).

During the month the contractor sought and obtained a deviation from the specification requirements affecting the placement of construction joints.⁵¹ The deviation granted was described by the project supervisor as a "compromise" (Tr. 506). Appellant's counsel objected to this description on the ground that it nowhere appeared in the dairy entry for that day (Tr. 553, 554). This is true but it is evident that Mr. Orndorff was not wholly satisfied with the deviation granted for he continued to object to the altered requirement.⁵²

Questions involving the interpretation of the specifications continued to arise. Some questions were answered by Mr. Longstreth at the time of his weekly visits. The answers to other questions were obtained from the architect on the telephone. Still others were referred to the architects for answers by means of Mr. Longstreth's written reports of his visits (L (2/10/60) (2/17/60) and (2/22/60), Government Exhibit No. 3). On at least one occasion the project supervisor furnished what he considered to be the obvious answer to a specification question.⁵³ A contractor error in placing piles for one of the columns was noted but no remedial action was required.⁵⁴

The contractor had placed forms for footing "P" but the project supervisor stopped him from pouring the concrete because the bottom of the footing was not considered to be a proper foundation (Exhibit

⁵¹ (S (2/5/60), Government Exhibit No. 11).

⁵² "Contractor claimed that to this day he has not received clarification on the matter of construction joints at the top of footings which caused such a furor lately and was the reason for his call to EODC and request for this particular meeting. He was reminded that he was instructed about the details of this construction joint and considerable discussion resulted with the contractor expressing dissatisfaction about the way it was handled. * * *" (Minutes of Conference, S (2/17/60), Government Exhibit No. 11).

⁵³ (V (2/5/60), Appellant's Exhibit "J").

⁵⁴ " * * * The contractor made an error in placing the piles for column G 3" too close to the center of the Rotunda. After correspondence and study it was decided not to require remedial action since the columns was [sic] adequate for this amount of bending. * * *" (Architect's Monthly Report—February 1960, Government Exhibit No. 3).

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G-2). The same day a letter was dispatched to the architects confirming an earlier telephonic report of the condition encountered (Exhibit G-2a). Drawing R-10 (2/2/60) depicting a "Revised Footing 'P'" was delivered to the contractor's superintendent on February 5, 1960.⁵⁵ The footing was not concreted, however, until March 29, 1960 (Tr. 505, 506).

Questions raised by Mr. Orndorff at the conference of February 17, 1960, related to (i) the absence of written approval for the extra work involved in the revised foundations; ⁵⁶ (ii) the procedure to be followed in the future when extra work was required of him; ⁵⁷ (iii) the length of time required to get information from the architects because of the need to go through EODC or Smith; and (iv) the reason why specification discrepancies could not be resolved by someone on the job.⁵⁸ By letter of February 29, 1960 (Exhibit F-1), the contracting officer urged the contractor to submit his estimate for the revised foundation work. In the same letter the contracting officer stressed that written authorization with respect to changes should be obtained from the contracting officer, noting that the procedure had not been followed in reference to the revised foundation work.⁵⁹ The letter concluded with the request that any other changes then outstanding be brought to the contracting officer's attention.

The contractor's estimate for the revised foundation work covered by drawing R-8 (1/19/60), was submitted by letter dated February 29, 1960 (Exhibit C-6). The total amount claimed was \$20,224 of which \$9,422 represented the claimed cost of doing the additional work (Item 1 of claim letter) with the remaining \$10,802 of claimed costs described as "losses and expenditures suffered by our firm due to the 45-day delaying period between December 11, 1959 to January

⁵⁵ This matter is covered in the Findings (p. 48).

⁵⁶ "The contractor was reminded that when the revised print R-8 was submitted to him, he was requested for an estimate to cover the cost of making the changes [in foundations] indicated on this drawing. To date that estimate has not been submitted. * * *" (Minutes of Conference, S (2/17/60), Government Exhibit No. 11).

⁵⁷ "When the contractor raised the question of how to proceed in the future when the question of extra work arose, Mr. Nutt stated that he should get written approval before proceeding" (Minutes of Conference, S (2/17/60), Government Exhibit No. 11).

⁵⁸ "Contractor raised the point of discrepancies in the plans and complained of the necessity for going through Mr. Longstreth to the west coast and back for answers. He hopes to have the answers directly from someone on the job immediately when his questions are asked. Again he was reminded by Mr. Nutt that they should anticipate their problems far enough in advance to avoid any serious delays. * * *" (Minutes of Conference, S (2/17/60), Government Exhibit No. 11.)

⁵⁹ Exhibit F-1, p. 1.

25, 1960 * * * (Items 2 through 7 of claim letter).⁶⁰ The contractor also requested an extension of time of 45 calendar days from December 11, 1959 to January 25, 1960.

Although weather conditions seriously hampered construction in March, the contractor accomplished 3 percent of the contract work (Monthly Progress Reports, Exhibit E-1).⁶¹ Questions concerning the specifications and drawings continued to be submitted to Mr. Longstreth on his weekly visits. Those involving the resolution of apparent discrepancies were generally referred to the architects in California, as were the contractor's request for deviations from the specification requirements (V (3/7/60) Appellant's Exhibit "J"); (L (3/23/60), Government Exhibit No. 3); (S (3/8/60), Government Exhibit No. 11). In other instances the questions presented were resolved by Mr. Longstreth on the day of his visit (L (3/1/60) and (3/31/60), Government Exhibit No. 3); (V (3/7/60), Appellant's Exhibit "J"). In at least one case the project supervisor resolved the question involved by simply referring to the provisions of the specifications (Exhibit G-6b).

During the month the relationship of proper concrete forms to quality of work was stressed by the project supervisor (S (3/7/60) and (3/8/60), Government Exhibit No. 11),⁶² as was the importance of adhering to the specification requirements (Exhibit G-6b).

On March 2, 1960, the superintendent reported to the project supervisor that the contractor had erred in pouring the pedestal at location "Q." The project supervisor developed a sketch to show the condition

⁶⁰ Included in these items were supervision, overhead costs, labor costs, the expense of idle equipment, and temporary heat.

⁶¹ This compares with an average rate of completion required to meet the performance schedule established in the contract of slightly more than 8 percent per month. Weather conditions were reported to be generally favorable for construction purposes in April and May but only 2 percent and 3 percent, respectively, of the contract work was accomplished during those months. In June and July the rate was 2 percent with the rate of 4 percent being attained in August and maintained in September. Only in October (8 percent) and November (10 percent) of 1960 and November (9 percent) of 1961 did the contractor equal or exceed the average rate of completion required by the initial contract terms. (Architect's Monthly Reports, April and May, 1960, Government Exhibit No. 3); (Monthly Progress Reports, Exhibit E-1).

⁶² Problems attributable to form work recurred throughout much of the life of the project. Many of them were of a serious nature and were compounded by other deficiencies in workmanship, as is illustrated by the following passage from the project supervisor's diary of December 19, 1960: "The first thing this morning I asked Willie what he proposed to do to correct the bulge in the Cyclorama wall. He indicated he was going to cut it down. I told him I didn't think cutting it down was the answer—that I thought the wall had a flat space in it * * * When asked by Willie if I would require it to be replaced I answered that if it was still discernible that it was not a true circle, it would have to be replaced. I suggested they start immediately to cut the wall so that we could see whether or not the parapet wall had to be removed for replacing and suggested that it be done before the roofing is put on to avoid patching later. * * *" (Exhibit G-20b).

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at "Q" and by letter of March 4, 1960, the matter was referred to the architects for decision. Within a week of the date of the letter the contractor was notified of the remedial action required by the architects. It was not until March 23, 1960, however, that the contractor poured 1¼ cu. yds. of concrete at this location with the last 4½ cu. yds. of concrete being poured in column "Q" on April 19, 1960 (V (3/23/60) (4/19/60), Appellant's Exhibit "J"); (L (3/16/60), Government Exhibit No. 3); (S (3/2/60) (3/4/60) and (3/11/60), Government Exhibit No. 11).⁶³ Work was also delayed because the soil conditions were not acceptable for the pouring of concrete (L (3/16/60), Government Exhibit No. 3) (V (3/24/60) (3/25/60), Appellant's Exhibit "J"), and (Exhibits G-3, G-6a and G-6b), or because the reinforcing (i) had been misplaced (Exhibit G-6) (ii) was of the incorrect size (Exhibit G-6b), or (iii) was coated with mud (Exhibit G-3).

A question also arose concerning the propriety of using the grades shown on the grading plan in view of the relocation of the building.⁶⁴ Mr. Longstreth determined that the finish grades adjacent to the building should be maintained, even though there might be some variations in the final grading. The contractor also raised a question as to the failure of the site excavation contractor to adhere to the grading plan.⁶⁵

Serious complaints as to the nature of the contractor's supervision were lodged with both the superintendent⁶⁶ and Mr. Orndorff by the project supervisor on several occasions. Among the recommendations made were that a concrete foreman be obtained⁶⁷ and that an engineer

⁶³ The pedestal "Q" episode is included among the numerous examples cited by the contracting officer in his findings as illustrative of deficiencies in the contractor's organization and mismanagement of the job, which, in his opinion, characterized the contractor's performance and which accounted in large measure for the excessive cost of completing the contract (Findings, pp. 47-56). Commenting upon this particular situation, the contracting officer states: "The Project Supervisor's log of March 2, 1960 (Exhibit No. G-4) shows that Pedestal "Q" was concreted in wrong location and had to be removed. Pedestal "Q" was not completed until April 19, 1960. This lapse of seven (7) weeks, resulting from poor management, planning, and lack of skill retarded progress on the Cyclorama with added costs to the Contractor" (Findings, p. 48).

⁶⁴ (Exhibit G-3, p. 2).

⁶⁵ "Willie handed to me data showing elevations of the original ground at the north end of the office building that he claims Orndorff had to excavate because it was not excavated to the elevation shown on the grading plan by Maitland" (S (/18/60), Government Exhibit No. 11).

⁶⁶ (Exhibits G-3 and G-6b).

⁶⁷ Although the building was basically concrete, a concrete foreman was not employed until August 17, 1960 (Exhibit E-10).

be engaged to lay out the work⁶⁸ and to check on the details.⁶⁹ These complaints were to be repeated again and again in the ensuing months.

On April 8, 1960, the contractor's general superintendent, Mr. Ross, asked the project supervisor (i) whether he considered the job superintendent to be capable of handling the job, and (ii) if he knew where the contractor could obtain a good superintendent (Exhibit G-9). On at least one occasion the superintendent was severely upbraided by Mr. Orndorff (Exhibit E-6). Late in October of 1960, Mr. Orndorff informed the project supervisor that the job superintendent was to be discharged and that as of November 2, 1960, Mr. Ross, general superintendent, would assume full responsibility for the job. In response to an inquiry from the project supervisor as to the timing of the decision, Mr. Orndorff stated that he had not been able to release Ross from other work that he had until then, as well as assigning other reasons. Mr. Ross expressed doubt that anyone else could master the details of the job at that late date and he appears to have ultimately refused to accept the assignment. Apparently, Mr. Orndorff concluded within a very short time that the job superintendent, whatever his limitations, was more qualified for the position than any man available within his organization. In any event, Mr. Verbitsky was unquestionably in charge again as job superintendent by November 7, 1960, and continued in that capacity until the project was completed.⁷⁰

Extensive negotiations were conducted during the month of March 1960 in an effort to provide formal contractual coverage for the work entailed in the foundation revisions. After receiving a copy of the contractor's letter of February 29, 1960 (Exhibit C-6), the architects submitted their estimate of a reasonable price for effecting the revisions to the foundations required by drawings R-8 (1/19/60) R-10 (2/2/60) and R-12 (2/12/60). Noting that they were using the unit prices taken from the contractor's letter of December 2, 1959 (Exhibit C-4b), the architects stated:

Our conclusion for item No. 1 of the claim * * * is that it should be worth about \$1,625 complete. The unit prices include overhead and profit. (Letter of March 3, 1960, Exhibit F-2).⁷¹

⁶⁸ "Mr. Orndorff introduced Mr. Ross, his office engineer who has been assigned to the project to be at the site from now on in order to help in the layout of the work." (L (3/16/60), Government Exhibit No. 3).

⁶⁹ "I told [Mr. Orndorff] that I had discovered 4 separate discrepancies in the placing of reinforcing, and in one case it had already been covered with concrete and I compromised by allowing dowels to be inserted. I reminded him that it was his responsibility to check these details and that they should not be left until I visited the job just before the pouring of concrete to point out these deficiencies. * * *" (Exhibit G-7).

⁷⁰ (Exhibits G-23, G-24); (S (11/3/60) (11/4/60) and (11/7/60), Government Exhibit No. 11).

⁷¹ The architects had serious reservations about the priority of allowing Items 2 through 7 of the claim (note 60, *supra*).

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By letter of March 15, 1960, the contractor reduced the amount claimed for Item No. 1 to \$8,679 without making any changes, however, in the amounts claimed for Items 2 through 7 (Exhibit C-4d). To reach an accord the parties had to reconcile substantial differences in their respective estimates of the material and work involved in various categories (reinforcing steel, concrete, hand excavation and machine excavation) to accomplish the revisions to the foundation (Report on Cost of Foundation Changes, Exhibit F-3; Exhibit G-6a); and (S (3/9/60), Government Exhibit No. 11). The negotiations were further complicated by the initial refusal of the contractor to agree to the use of the unit prices submitted with the contractor's letter of December 2, 1959 (Exhibit C-4b).

To resolve these differences negotiation conferences were held on March 22 and March 25, 1960. The negotiations embraced the changes involved in Drawings R-10 (2/2/60) and R-12 (2/12/60), as well as the initial revisions to the foundation contained in Drawing R-8 (1/19/60). (Exhibit C-4a; Government Exhibit Nos. 5 and 6). In the conference of March 25, 1960, the parties agreed that the contractor should be paid the sum of approximately \$4,101 for accomplishing the foundation changes.⁷² The contractor's agreement to the settlement was confirmed by letter of March 29, 1960, in which the contractor requested the sum of \$4,101.50 and reduced the extension of time requested to 15 days. The letter made clear, however, that the figure agreed upon did not cover Items 2 through 7 of the claim and that these items were reserved for further negotiations.⁷³ Within a few days Change Order No. 1 was issued in implementation of the agreement reached (including issuance of a 15-day time extension). On April 15, 1960, Mr. Orndorff accepted the change order on behalf of the contractor, stating that the adjustment in compensation and time "is satisfactory and is hereby accepted."

Contractor's Contentions

Changed Conditions—We have previously noted that the appellant may have abandoned reliance upon the claim of changed conditions (note 13, *supra*). In view of the importance attached to the Changed Conditions clause in the notice of appeal (note 6, *supra*), however,

⁷² " * * * The unit prices that had previously been submitted by the contractor were used as a basis for this negotiation. The basis of settlement was in the amount of \$4,100 compared to the contractor's original estimate of \$8,600." (Exhibit G-7).

⁷³ (Exhibit C-4a).

as well as the fact that Mr. Orndorff not only referred to changed conditions in his testimony but also specifically cited the "Changed Conditions" clause (Tr. 33, 120),⁷⁴ we shall address ourselves to the question of the relief, if any, available to the contractor under the provisions of such clause.

According to Mr. Orndorff's testimony, the changed conditions consisted of changes in the location of the building which delayed the contractor with the result that (i) they were forced back into adverse weather conditions, and (ii) the phasing and programming of the project was changed (Tr. 79, 152). To establish that the location of the building had been changed from that contemplated in the contract drawings, the contractor relies principally upon (i) advice concerning such a change received from the site preparation contractor prior to the bid opening; (ii) the fact that the original building location could be established reasonably well by using the scale on the drawings, which did not, however, coincide with the excavations that had been made by the site preparation contractor; (iii) various entries in the three diaries maintained in reference to the project; and (iv) the contractor's own excavations (of the footings) which proved that the building was not located in accordance with the original design (Tr. 32, 93-97, 454, 455).

The Government does not contest the fact that the pivot point of the Cyclorama was changed subsequent to the time that the specifications and drawings in question were prepared in June of 1959. It does contest the contractor's allegation that this constituted a change in the location of the building, however, since it occurred prior to the issuance of the invitation (Tr. 385-388). The following colloquy between Government witness Longstreth and the hearing officer points up the nature of the distinction:

[Q] On this change in footing design, Mr. Longstreth, was this a change that resulted from the relocation of the building as it was originally going to be placed or was it necessary because of what you found on the general ground conditions here at the site?

⁷⁴In pertinent part the clause reads: "The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (1) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (2), unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly * * *." (Clause 4, Changed Conditions, General Provisions, Standard Form 23A, March 1953 Edition).

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[A] It was a result of what was found on the general ground conditions because this change in position is something that has not been documented as to when it was changed and it is my understanding that the alleged change occurred prior to the contractor moving on the site (Tr. 306, 307).

Approximately two weeks before the opening of bids, Mr. Orndorff, accompanied by his estimator, made a site examination. When Mr. Orndorff visited the site again three or four days later, the site preparation contractor told the contractor of the change in the location of the building. The site preparation contractor also told him specifically where the building had been moved and showed him where excavation had been performed over and beyond that required for the building as then located. Mr. Orndorff attempted to discuss the matter of the building having been moved with Mr. Myers, but the contracting officer refused to discuss the subject (Tr. 92-95). Mr. Orndorff's entire testimony, as it relates to the contracting officer, consists of the bald statement that the attempt to discuss the matter was made prior to the opening of bids. We do not know precisely when the attempt was made or the reason, if any, that the contracting officer gave for refusing to enter into discussions as to the relocation of the building; nor has Mr. Orndorff offered any explanation for his failure to resort to the procedure clearly outlined in the invitation for submission by prospective bidders of written questions pertaining to interpretation of the specifications or drawings.⁷⁵

In support of the assertion that the location of the building could be established reasonably well from the contract drawings, the contractor points to the first sheet of the drawings which under the caption, "Finish Grading Plan," shows an outline of the Cyclorama and office building and depicts existing contour and new contour lines. In addition, the contractor points to Sheet A-1 of the drawings entitled "Survey Map—Existing Conditions" which shows the location of various topographical features, as well as contour lines. Both drawings use a scale of 1"=50'. In the contractor's view the use of the information shown on these two drawings, in conjunction with the scale, would permit the location of the building (Tr. 96, 97, 199, 200). Mr. Orndorff acknowledged upon cross-examination, however, that there is nothing on the plans and specifications that specifically locates the building; that the drawings in question show simply a site location with a structure superimposed thereon; and that there were no dimensions and no specific details as to the exact location of the building (Tr. 95-97).

⁷⁵ (ART. 31, Questions, Special Provisions, Specifications, p. B-8, Exhibit "A").

The Government witnesses deny that it was ever intended to locate the building by applying the scale to the other data shown on the contract drawings. Government witness Nutt unequivocally stated that from the information on the drawings he (with 35 years of experience in engineering architecture) would not have been able to locate the pivot point (center of Cyclorama drum), and that the building could not be located by scaling from the contour lines shown on the drawings. Mr. Nutt also asserted that a note on the plans alerted bidders to the fact that locations were not to be established by utilizing scaled dimensions from the drawings (Tr. 394, 395).⁷⁶ Government witness Longstreth referred to Articles 43⁷⁷ and 44⁷⁸ of the General Provisions and expressed the opinion "that this plot plan and survey plan are not to be scaled necessarily and that the exact positions of any features shown on them must be verified by the contractor in submitting his bid in the original form" (Tr. 311, 312).

From the appeal record, it appears that the initial building location (in so far, at least, as grading by the site preparation contractor was affected by it) was established by Government engineer Westerfield.⁷⁹ When architect Nutt brought the invitations with him to the Gettysburg National Park to distribute to bidders, he moved the pivot point ten feet east of the pivot point previously established by Westerfield. Concerning this action Mr. Nutt testified that it was necessary because the tentative location of the Visitors' Center would, if maintained, encroach upon the historic Siegler's grove. He also testified that the reestablished pivot point was placed at a permanent location; that it was done before the invitation was issued; and that it was the pivot point that was ultimately used for the building constructed (Tr. 385-389).

⁷⁶ "NOTE: This plan is reprinted for the convenience of the Bidders on the Building Construction from the documents prepared for a separate site preparation contract. Bidders shall visit the site, however, prior to submitting a bid, and shall ascertain and take responsibilities for exact field conditions under which they will have to perform the Building Construction Work." (Sheet A-1, Drawings, Exhibit "B").

⁷⁷ "Drawings showing locations or character of existing conditions and work, including dimensions and extent thereof, are shown for convenience only and are believed to be correct but shall be subject to verification at the site by the Contractor as the Owner assumes no responsibility for their correctness. The Contractor shall make allowance in his bid for any existing conditions found to be at variance with the drawings." (ART. 43. Existing Work Shown And Dimensions Thereof, Specifications, p. A-13, Exhibit "A").

⁷⁸ "Before moving onto the site, ordering materials or performing work, the Contractor shall verify all measurements as may be required by his work, and will be held responsible for the correctness of his figures. He shall particularly recheck all dimensions referring to placing the building on the site, all structural versus architectural dimensions, and in general, exercise responsible foresight in anticipating problems of the fitting together of the many varied elements of the structures. No allowance will be made subsequently in behalf of the Contractor for any error or negligence on his part." (ART. 44. Measurements, Specifications, p. A-13, Exhibit "A").

⁷⁹ "Mr. Nutt told me over the phone when he visited the job September 14, 1959, he changed the location of the building that had been laid out by Westerfield" (S (9/27/61), Government Exhibit No. 11).

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The diaries contain various references to changes in the pivot point which do not conform to Mr. Nutt's testimony in material respects. These references are readily reconcilable with his testimony, however, when consideration is given to the fact that the changes in directions and distances reflected in such entries proceeded from an entirely different starting point for the initial pivot. Mr. Nutt moved the pivot point ten feet east of the building location tentatively established by Mr. Westerfield (note 79, *supra*; (S (11/23/59), Government Exhibit No. 11). References by Mr. Longstreth and others to the building location having been moved 20 feet east and 12 feet south are based, however, upon the "Location Plan for Borings and Test Pits" dated May 1959 and incorporated in Mr. Stickel's Foundation Investigation Report of the same date (note 36, *supra*). It is noteworthy that prior to Mr. Stickel's visit to the job site on December 22, 1959, Mr. Orndorff, Mr. Longstreth and the project supervisor had all referred to the building location having been moved 10' east of that shown on the contract drawings (note 31, *supra*); (S (11/23/59) (12/22/59), Government Exhibit No. 11).

By reference to the scale shown on the contract drawings the appellant established through his witness Verbitsky that the building had been moved eastward by approximately ten feet from the location shown on the drawings (Tr. 407). This is highly indicative that the contract drawings either (i) did not reflect the pivot point used by Mr. Stickel in preparing his initial foundation report, or (ii) were not intended to permit an inference as to the location of the building by applying the scale shown on the drawings to various topographic features or to contour lines. Concerning the extent to which the building location was changed Mr. Orndorff testified:

To the best of our knowledge it was moved some 15 feet to the west and 30 to 40 feet south (Tr. 35).

This statement is without any support in the entire record and is contradicted by the testimony of appellant's witness Verbitsky to which we have just referred.⁵⁰

The Government does not contest the fact that for certain locations the drawings indicated rock at specified elevations and that rock acceptable for footings was not encountered at all of such locations at the elevations shown. The Government denies, however, that the contractor was warranted in treating the information shown on the drawings

⁵⁰ While not specifically referred to in this section of the opinion, the Board has also considered the material contained in the diary of the contractor's superintendent (V (12/11/59) (12/29/59) and (1/15/60), Appellant's Exhibit "J") and the testimony reported at pages 98, 99, 308, 317, 338, 339, 398, 418, 429, 456, 490, 494, 495, 546, 547 and 553 of the transcript.

as the equivalent of test borings at the location in question or that they could otherwise be regarded as unqualified representations that rock would be encountered at the indicated elevations. In support of this position Government witness Longstreth replied principally upon Article 6 (note 33, *supra*), although citing other contract provisions as well.⁸¹ The Government also denies that the information in its possession affecting foundation conditions was any greater before the change in the building location than it was afterward.⁸²

The Government offered evidence to show that the conditions actually encountered were substantially similar to the conditions depicted on the contract drawings and that none of the changes were of a fundamental nature. The original excavations where the project supervisor stopped the pouring of concrete were all ultimately used in the building constructed, although in some cases they were deepened. All of the 23 piles shown on the drawings as to be used for footers were driven at the locations shown thereon, even though three piles were added by reason of Drawings R-8, R-10 and R-12. There was no change in the center line location of the columns. Such changes as were made affected only the profile of the foundations either by way of enlargement or by change of the type of footer (pile type *vs.* spread type).

To be afforded relief under the Changed Conditions clause, the appellant must show by the preponderance of the evidence that (i) the subsurface or latent physical conditions encountered at the site differed materially from those indicated in the contract (first category changed conditions), or that (ii) it was confronted with unknown physical conditions of unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract (second category changed conditions). *Ray D. Bolander Company, Inc.*, IBCA-331 (November 16, 1965), 72 I.D. 449, 65-2 BCA par. 5224; *Inter-City Sand and Gravel Co. et al.*, IBCA-128 (May 29, 1959), 66 I.D. 179, 59-1 BCA par. 2215. Taking into account the evidence of record⁸³ and the applicable contract provisions, particularly Article 6 (note 33, *supra*), and Articles 43 and 44 (notes 77 and 78, *supra*), we have grave doubts that the appellant is entitled to relief under either category of the Changed Condi-

⁸¹ The specific direction to prospective bidders in Article 44 ("particularly recheck all dimensions referring to placing the building on the site"), note 78, *supra*, lends substantial support to the Government's position.

⁸² Government witness Nutt testified that the Government "had the same knowledge before and after the ten-foot change" (Tr. 393).

⁸³ The contractor has offered no evidence in support of a claim of changed conditions in the second category and the language used in the notice of appeal (note 6, *supra*), as well as elsewhere, denotes a first category changed conditions claim.

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tions clause. It is unnecessary for us to decide this question, however, since, assuming changed conditions were encountered, relief for correcting or coping with such changed conditions was provided by way of an equitable adjustment to the contract price in Change Order No. 1. The contractor having accepted the change order in settlement of its claims, in so far as they were cognizable under the terms of the contract, we are without any authority to rewrite the change order to provide for a greater or lesser equitable adjustment in the contract price than that reflected in the agreement of the parties.⁸⁴ While various claim items were specifically excepted from the coverage of Change Order No. 1 by the contractor's letter of March 29, 1960 (note 73, *supra*), all of the excepted claims represent standby costs and other costs attributable to Government delay (note 60, *supra*). Absent a "pay for delay type clause,"⁸⁵ we have consistently held that claims of this nature are not within the purview of our jurisdiction.⁸⁶

Discrepancies in the plans and specifications—In his posthearing brief (pp. 22-46) appellant's counsel attempts to show that there were numerous discrepancies in the plans and specifications which were detrimental to the contractor in the performance of the contract. With relatively few exceptions, however, the appellant's showing has consisted of establishing that questions involving the plans and specifications did arise during the course of contract performance and that in a substantial number of instances they were submitted to the architects in California for decision, without offering any proof to show either (i) the time required for decision on the question presented, or (ii) the adverse effect, if any, upon the contractor's operation of any delay involved in reaching a decision.

Of the 39 instances of specification deficiencies referred to in appellant's brief as taken from the project supervisor's diary between December 18, 1959 and November 16, 1961, no delay in decision is evident from the entries recorded on February 9, 1960, March 25, 1960, April 1, 1960, September 21, 1960, September 27, 1960, February 2, 1961, and March 30, 1961. On two of the occasions mentioned (September 21 and September 27, 1960), the decision was made by

⁸⁴ *Continental Consolidated Corp.*, ASBCA No. 10114, 66-1 BCA par. 5530; *Seaboard Surety Co.*, ASBCA No. 6716, 1962 BCA par. 3407.

⁸⁵ Article 70 (note 35, *supra*) has been found not to be such a clause. *Seal and Company*, IBCA-181 (December 23, 1960), 67 I.D. 435, 61-1, BCA par. 2887.

⁸⁶ See *W.R.S. Pavers, Inc.*, IBCA-445-6-64 (March 30, 1967), 67-1 BCA par. 6238, in which, citing authorities, the Board stated: "Although the Changes clause (Clause 3) and the Changed Conditions clause of the contract each contain provisions for equitable adjustment, it is well settled that neither the Changes clause, nor the Changed Conditions clause of Standard Form 23A extend to claims that are grounded upon delay of the Government, in the absence of a Suspension of Work type of clause (not present here), which expressly provides for an equitable adjustment of the contract price for Government delay. * * *

the architects on the same day the question was submitted by telephone, even though one of the questions (September 21, 1960) involved a deviation from the specification requirements rather than a discrepancy. Other questions included in the same listing relate to a segregated contractor, such as that recorded on May 4, 1960 (electrical), or simply pertain to contemplated changes in the specification requirements, as is illustrated by the entries for (i) May 23, 1960 (provision for closets in offices considered); (ii) July 29, 1960 (price to be obtained from contractor for installing a cat walk); (iii) September 8, 1960 (structural revisions required to house 10 gallon *vs.* 5 gallon capacity drinking fountain); (iv) September 12, 1960 (approval of expenditures for closets in offices, cat walk back of painting and soap dispensing system); and (v) December 7, 1960 (substitution of white pine for fir). Other so-called discrepancies which purportedly delayed the contractor involved (i) acceding to the contractor's interpretation of the specification requirements (June 1, 1960); (ii) unsuccessful efforts to ascertain where a representative sample of thoroseal could be viewed by the contractor (October 31, 1961); (iii) decision by the project supervisor with the concurrence of the contracting officer on the question presented (April 6, 1961); and (iv) discussion between the project supervisor and the superintendent as to the contractor's responsibility for making minor changes to accommodate the work (September 7, 1960).

Similar analyses could be made of the entries in the other two diaries to which attention is invited in appellant's brief. They would be largely cumulative, however, of the entries in the project supervisor's diary discussed above, in so far as such analyses would show the indiscriminate lumping together of various items and billing them as specification discrepancies. For present purposes it is sufficient to note that of the 27 entries specifically referred to from the diary of the contractor's superintendent, the first 8 entries record questions which arose prior to or during the period of the investigation of foundation conditions (December 11, 1959 to January 22, 1960). Any delay in answering questions pertaining to the specifications during such period would appear to have had little or no effect upon the contractor's operations, since, according to Mr. Orndorff's testimony, little work of consequence was accomplished during that period (Tr. 126).

The testimony offered at the hearing did little to resolve the questions involving alleged specification discrepancies either as to (i) the length of delay, if any, in rendering a decision, or (ii) the effect, if any, that such delay as was experienced may have had upon the contractor's operation. In most instances the principal witnesses for both the appellant and the Government testified in reference to

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entries recorded in one or more of the three diaries. Only rarely did any of the diaries record more than the fact that a question of some sort involving the specifications had been raised and by whom it had been decided or to whom it had been referred for decision. In the great majority of cases the date a particular answer was received would have been revealed in the correspondence files but, generally speaking, the witnesses testified without having access to the contents of such files (Tr. 242, 243, 361, 362, 554).⁸⁷

The nature of the difficulty is disclosed by the following exchange between Mr. Orndorff and the hearing officer:

[Q] What was the date of the approval that you obtained from the Government?

[A] I don't remember the dates as indicated here, securing approval of this item so that construction could not be commenced until September 9.

[Q] This leaves it a little indefinite—when you actually obtained the approval.

[A] We started immediately after. Not only with respect to this detail but all details and I wouldn't exclude one (Tr. 46, 47).⁸⁸

Mr. Orndorff's confidence in the promptness with which the contractor acted when answers were received is not borne out by the record. The 7-week delay in proceeding with the work called for by the revised drawing for the footing at location "P" (note 55, *supra*) and the 5-week delay in replacing the defective pedestal at location "Q" (note 63, *supra*) are only two examples of the contractor's delay in acting upon information received.

There are other difficulties from the appellant's standpoint, however, not the least of which is the fact that there was hardly a time during the approximately two years of contract performance when the contractor's own deficiencies (inadequacy of supervision, lack of planning, failure to adhere to specification requirements, shoddy work, and lack of an experienced labor force) did not materially contribute to the delays involved in completing the contract work and inordinately increase the cost of performance. The delay of approximately a month in getting a hammer of sufficient capacity on the job for driving test piles (notes 41, 42 and 46, *supra*) (during the six weeks the Government took to complete the foundation investigation) foreshadowed other conditions contributing to delay for which the contractor would be responsible throughout the balance of the project. In many instances the delays originating with the contractor existed simultaneously with delays for which the Government was unquestionably responsible. In

⁸⁷ The correspondence available by reason of being attached as exhibits to the findings or being offered in evidence by the parties had not been selected primarily for the purposes discussed in the text and, consequently, is only of limited value in this connection.

⁸⁸ Previous to this exchange, Mr. Orndorff had testified that the construction joint details in question were submitted to the architects for approval on April 25, 1960 (Tr. 45-46).

other situations the delays for which the Government and the contractor were respectively responsible are so inextricably entwined as to make virtually impossible any determination of the period for which each was responsible.⁸⁹

There is evidence, nonetheless, that both the architects and the Government were responsible for delays in making decisions on questions involving the interpretation of the specifications and the resolution of specification discrepancies. The appellant's brief gives examples of delays involving questions of this nature for which no adequate explanations have been offered by the Government. The entry in the project supervisor's diary for November 16, 1961 (delay of nine days already experienced and still without an answer),⁹⁰ is one example where there is some indication of the period of the delay. The appellant's case is seriously weakened, however, not only by the fact that in most instances it is impossible to tell from the record the period of the delay involved but also by the fact that there is little in the record to show the follow-up action, if any, the contractor initiated in areas where the contractor alleges it was seriously impeded in performing the contract by the delay in obtaining a decision (e.g., construction joints). The problem is further complicated by the fact that the contractor appears to have never submitted questions in writing to Mr. Longstreth (Tr. 304-306), even though this procedure was apparently agreed upon at the pre-construction conference (note 27, *supra*), and even though adherence to such a procedure would have materially increased the prospects for an early answer (Tr. 351, 352). Lastly, there are a substantial number of instances where the specifications requirements were unquestionably clear but the contractor's personnel had not familiarized themselves with the requirements (Tr. 243-245) or, as was often the case, they were seeking approval of deviations from such requirements either before or after the work had been performed (Tr. 334, 335).

Even if it could be said that it is entirely clear from the record before us that the architects or the Government, or both, had unreasonably delayed the contractor to his detriment by the time consumed in resolving specifications discrepancies ("pure" delay), and if there were no countervailing contractor-caused delays, we would still be unable to grant relief. The actions of the architects or the Government in such circumstances would undoubtedly involve a breach of the contractual obligation not to hinder the contractor in the performing

⁸⁹ In such situations relief has been denied where the delays were found to be contemporaneous (*Tuller Construction Company v. United States*, 118 Ct. Cl. 509 (1951)), or where the defendant's delay was concurrent or intertwined with other delays (*Commerce International Company, Inc. v. United States*, 167 Ct. Cl. 529 (1964)). Cf. *Tobe Deutschmann Laboratories*, NASA BCA No. 73, 66-1 BCA par. 5413.

⁹⁰ Appellant's post-hearing brief, p. 33.

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of his contract, but it would not involve a breach of contract for which the Changes clause⁹¹ or any other clause contained in the contract provides a remedy.⁹²

Delays of the Government and of Segregated Contractors

The appellant also asserts (post-hearing brief, pp. 46-63) that the Government and segregated contractors⁹³ were responsible for delays which inured to the detriment of the contractor. In large measure, however, the appellant has been content simply to establish through entries in the three diaries that various delays arose during the course of contract performance, without showing either (i) the period of the particular delay, or (ii) the manner in which performance of the contract as a whole was delayed thereby.

The deficiencies in the proof offered are illustrated by the excerpts from the superintendent's diary (Appellant's Exhibit "J") quoted in the appellant's post-hearing brief (pp. 47-51). Of the twenty-seven excerpts involved covering the period December 21, 1959 through June 7, 1961, the first five entries relate to delays incident to the investi-

⁹¹ "The Contracting Officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change: Provided, however, That the Contracting Officer, if he determines that the facts justify such action, may receive and consider, and adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Clause 6 hereof. But nothing provided in this clause shall excuse the Contractor from proceeding with the prosecution of the work as changed. Except as otherwise herein provided, no charge for any extra work or material will be allowed." (Clause 3, Changes, Standard Form 23A, March 1953 Edition).

"A. The Owner reserves the right to require alterations in addition to, or omissions from the work called for by this Contract and, should any such alterations, addition or omissions be required, the same shall in no way affect or make void this Contract. Unless otherwise provided in the Contract Documents, the Contractor shall not be entitled to any compensation for extra work unless orders therefore are given in writing duly executed by the Owner, and the amount of compensation for such extra work specified in such written orders. * * *" (ART. 58, Changes in the Work (augmenting Article 3, Standard Form 23A), Specifications, p. A-18, Exhibit "A").

⁹² *Electric Properties Co.*, IBCA-443-5-64 (September 3, 1964), 1964 BCA par. 4415 ("Without considering the merits of the appeal, there is no jurisdiction in the Board to consider the claim, for the reason that it is founded, concededly, on the alleged breach of an implied obligation (or possibly an alleged misrepresentation) on the part of the Government not to interfere with the performance of the contract").

⁹³ "ART. 5. Segregated Contracts: A. *General*: It is intended to receive 4 separate Prime Contract Bids on this project. Each Prime Contractor shall in all respects consider himself as a 'General Contractor' as defined in, and for the purpose of these Specifications. Whereas an effort has been made to list and differentiate items to be installed by each prime and subcontractor on the job, it shall remain the responsibility of the several Prime Contractors to carefully inspect all the Contract Documents (all of which shall apply to every Bidder) and include all that is necessary for a complete job regardless of where and how specified. * * *" (Information For Bidders, p. 2, Specifications, Exhibit "A").

gation of the foundation conditions (previously discussed in detail in this opinion). Some eight of the entries record questions presented to Longstreth or to the project supervisor without any indication of what answer was given or when it was received. Six of the entries reflect that delays had been experienced but their duration is not indicated. In two instances the period of the delay is either shown or some indication is given of its duration as shown by the following entries: (i) August 18, 1960 (project supervisor requests 4-day delay in pouring of circular columns on 26' radius wall to permit clarification of placing electrical receptacles); and (ii) June 6, 1961 (Longstreth calls California to ascertain how a particular cove is to be built after waiting 10 days for decision). Other entries record (i) the Government's or Mr. Longstreth's efforts to expedite decisions; (ii) the contractor being required to adhere to specifications or to establish procedures agreed to at an earlier time; (iii) deadlines imposed by the contractor's superintendent for receiving certain information; and (iv) the issuance of a stop work order by the project supervisor on April 29, 1960 relating to the 52' radius wall pending the receipt of information from the architects.

From the testimony offered at the hearing we have more information concerning some of the items referred to briefly above. We know, for example, that the information affecting the 52' radius wall (stop work order issued on April 29, 1960) was received from the architects on May 2, 1960 (Tr. 553). It also appears that Change Order No. 11 dated June 27, 1961, covered the work involved in constructing the particular cove previously mentioned and that the contractor accepted the change order and the equitable adjustment to the contract price provided therein without any exceptions having been taken (Tr. 523-524).⁹⁴

The record reveals that in a number of instances the appellant is seeking to recover costs allegedly incurred pending a decision on the change or changes to be made or increased costs allegedly incurred in connection with work not changed, by reason of the delay in the issuance of the change order or otherwise affected thereby. This position overlooks the fact that by the express terms of the contract the Government reserved the right to make changes as the work progressed (note 91, *supra*), and that such reservation has the sanction of the highest

⁹⁴ The acceptance of change orders in such circumstances would appear to constitute an accord and satisfaction. *Seaboard Surety Co.*, note 84, *supra*. There is no way of telling, however, the amount of claims of this nature which are related to change orders and we clearly would not have jurisdiction over such claims even if we were to find that no accord and satisfaction had occurred. There is no reason, therefore, for us to reach any conclusion on this question.

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judicial authority.⁹⁵ The Board has consistently relied upon the same authority as having established that (i) costs incurred pending the issuance of a change order are not subject to the equitable adjustment provisions of the contract,⁹⁶ and that (ii) increased costs of performing work not changed are not recompensable under the standard provisions of Government construction contracts,⁹⁷ where, as here, there is no "pay-for-delay" type clause included among the contract provisions. Nor is the situation any different with respect to delays or interferences by the Government not related to the Changes or other contract clauses.⁹⁸

The Court of Claims has refused to apply the *Rice* rule in cases where it has been shown that the Government willfully or negligently interfered with the contractor in the performance of the contract.⁹⁹ The Board has no authority to grant relief in such situations, however, even if the requisite showing were to be made.¹⁰⁰

The delays attributed to the segregated contractors are separately identified in appellant's post-hearing brief (pp. 57-63). In most instances it is not possible to tell either the period of the delay or the effect, if any, upon the contractor's performance. It is clear, how-

⁹⁵ *United States v. Rice*, 317 U.S. 61 (1942). In a recent decision involving the proper application of the so-called *Rice* doctrine the Comptroller General stated: "In any event * * * there appears to be little, if any, doubt that the doctrine at the very least, forbids the payment administratively of delay or stand-by costs on *unchanged* work under the Changes Article of Standard Form 23A * * *" (Comp. Gen. Dec. B-161179, August 7, 1967).

⁹⁶ *Cosmo Construction Company*, IBCA-468-12-64 (August 3, 1966), 73 I.D. 229, 66-2 BCA par. 5736; *Peter Kiewit Sons' Company*, IBCA-405 (October 21, 1965), 72 I.D. 415, 65-2 BCA par. 5157 ("* * * In *United States v. Rice* * * * the contractor was delayed by a change in the location of the building that was to be constructed and there was a considerable delay while a new foundation was prepared. The Supreme Court held that the overhead expenses of the contractor for the period of delay while the changes were being issued and carried out could not be recovered from the Government.").

⁹⁷ *Peter Kiewit Sons' Company*, note 96, *supra*, at p. 421 ("In any event, it is clear that this claim is one for the costs of delay and for the 'ripple' effects or indirect results stemming from the issuance of a change order. As such (absent a 'pay-for-delay' type of contract clause) it is a claim for breach of contract. The contractor does not claim that it was not compensated for the direct costs of performing the changes themselves. In certain other claims made by the contractor, the delays and indirect results flowing from Change Order No. 1 are asserted to be responsible (together with other causes) for the necessity of continuing the project into the following year. * * *").

⁹⁸ *Electric Properties Co.*, note 92, *supra*; *R. G. Brown, Jr., and Company*, IBCA-356 (July 26, 1963), 1963 BCA par. 3799 ("It is well settled that in the absence of an express contract provision such as a 'Suspension of Work' clause (not present here) this Board has no jurisdiction over a claim for expenses incurred as a result of Government interference or delay. * * *").

⁹⁹ See, for example, *Peter Kiewit Sons' Company v. United States*, 138 Ct. Cl. 668 (1957).

¹⁰⁰ *Peter Kiewit Sons' Company*, note 96, *supra*, at p. 428 ("* * * Breach of this obligation would give rise to a cause of action in the courts. It is clear that under whatever theory appellant seeks recovery of expenses of delay, interruptions or loss of efficiency alleged to have been caused by Government actions—delay in staking and in the issuance of changes or on delay in the form of extended time of performance—the dispute must sound in breach of contract, where, as in this case, there is no contract provision permitting monetary compensation therefor. As such it is not within the jurisdiction of the Board. * * *").

ever, that the contract contemplated the award of other contracts (note 93, *supra*), and that the contractor was contractually obligated to cooperate with the other contractors involved on the project.¹⁰¹

Several entries in the diaries do establish substantial delays in the delivery of a dimmer board by one of the subcontractors of a segregated contractor (Keystone Electric). The dimmer board was scheduled for delivery in mid-July of 1961 (L (8/4/61), Government Exhibit No. 3), but was not completely delivered until November 2, 1961, with still further delays involved before the unit was made operable (S (11/2/61) and (12/28/61), Government Exhibit No. 11). The excerpts from the diaries quoted by appellant's counsel also record the conscientious efforts by both Mr. Longstreth and the Government personnel concerned to expedite the delivery of the dimmer board. That the contractor was materially delayed by reason of the late delivery of the dimmer board to the electrical contractor (and the still further delay before it became operable) is at least doubtful. The item was not even mentioned by appellant's witnesses, although testimony was offered as to delays by segregated contractors (Tr. 195-197, 269-276, 413-414).

Even if the appellant had shown by incontrovertible evidence, however, both the precise periods involved in the various delays attributed to segregated contractors and the adverse effect of such delays upon the contractor's over-all performance, he would still have failed to establish a claim for relief.¹⁰²

Phase Changes Attributable to Government Actions

In his post-hearing brief (p. 64), the appellant asserts that the question of phase changes¹⁰³ is directly related to other aspects of the claim such as (i) the change in the location of the building, (ii)

¹⁰¹ "The Government may undertake or award other contracts for additional work, and the Contractor shall fully cooperate with such other contractors and Government employees and carefully fit his own work to such additional work as may be directed by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor or by the Government employees" (Clause 12, "Other Contracts," General Provisions, Standard Form 28A, March 1953 Edition.)

¹⁰² See *Tree Land Nursery, Inc.*, IBCA-436-4-64 (October 31, 1966), 66-2 BCA par. 5924. Cf. *Yarno And Associates*, ASBCA No. 10257 (April 21, 1967), 67-1 BCA par. 6312.

¹⁰³ Mr. Orndorff defined "phase changes" as changes in the programming (from that set up when the project was estimated) necessitated, in part, by the change orders negotiated between the parties but also caused by discrepancies on the drawings (Tr. 137). The term "rephasing" is often used by the appellant's witnesses in this connection, as is illustrated by Mr. Orndorff's testimony concerning the effect of the contract being performed over a 2-year period rather than within the initially scheduled period of approximately one year, in so far as the consequences of adverse weather are concerned: "[A] In part, it doubles the effect but more important is the rephasing of the project. * * * Had we been ahead with the project as was scheduled by us and as was estimated by us, we could have had all of the foundation work completed before the winter set in in 1960 and the same in 1961. * * *" (Tr. 78).

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discrepancies in the plans and specifications, with neither the project supervisor nor Mr. Longstreth in a position to give answers, and (iii) other delays by the Government, as well as by the segregated contractors. It is further asserted that all of these, either singly or collectively, delayed the contractor and resulted in his being required to shift his men from one aspect of the job to another with increased delays, increased expenses and sometimes increased personnel to do the same job.

The arguments advanced to support the claim of phase changes (post-hearing brief, pp. 64-71) are largely dependent for their validity upon proof of the appellant's assertion that the contract required the Cyclorama building to be completed first and within 180 days (Tr. 38). The contractual provision relied upon is Article 21 (note 38, *supra*), of the plans and specifications (Tr. 208-210). The language used in the clause is regarded by the Board as more compatible with the expression of a desire on the Government's part to have the Cyclorama completed at an early date so as to permit the hanging of the painting, rather than with the establishment of a contractual requirement that the Cyclorama be completed within 180 days. Entirely aside from the question of the literal construction to be placed upon the language employed in the clause, however, there are two principal obstacles to accepting the appellant's view of the matter. First, there is the fact that the clause specifically designated "Sequence of Work" simply provides that work is to proceed in an orderly way.¹⁰⁴ The major hurdle for the appellant to overcome, however, is the fact that the construction placed by the appellant upon this clause in prosecuting the appeal is in marked contrast to the attitude displayed by the appellant toward the purportedly firm contractual obligation during the course of contract performance (S (7/13/60) (8/26/60) (10/6/60) and (10/12/60), Government Exhibit No 11; Tr. 128-130).

While the appellant's witnesses testified that the project supervisor directed the contractor to proceed with work in the area of the office wing, the time when such directions were purportedly issued is not clear from the testimony of either Mr. Orndorff or appellant's witness Verbitsky (Tr. 40, 125, 452, 453). Mr. Orndorff acknowledged, however, that when the foundation problem arose in the Cyclorama area,

¹⁰⁴ "ART. 69. Sequence of Work: Title to divisions and paragraphs in these contract documents are introduced merely for convenience and shall not be taken as a sequence of work, and furthermore, shall not be taken as a correct or complete segregation of the several units of materials and labor. No responsibility, either direct or implied, is assumed by the Government for omissions or duplications by the Contractor due to real or alleged error in an arrangement of matter in these contract documents. Work is to proceed in an orderly way." (Specifications, p. A-24, Exhibit "A").

the contractor was urged to concentrate his efforts in the office wing area (Tr. 125). He also acknowledged that work was not commenced in that area until the middle of the winter (Tr. 161). By resorting to his diary, Mr. Verbitsky established that work commenced in the area of the office wing shortly prior to February 9, 1960 (Tr. 439, 440). This was some time after the contractor had received the information required to resume construction in the Cyclorama area (notes 45 and 46, *supra*). When the contractor finally started work in the area of the office wing, there was no interference with his continuation of work in the Cyclorama area, according to the testimony given by the project supervisor (Tr. 524, 525).

Exclusive of the ambiguous testimony of appellant's witnesses, an independent review of the entire record has failed to disclose any evidence to support the view that subsequent to January 22, 1960, the contractor was directed by the project supervisor—or by anyone else on behalf of the Government—to proceed with work in the office wing area. Taking into account the testimony offered by both parties, as well as the other evidence of record, we find that the contractor's action in proceeding with the work in the office area in February of 1960 (Tr. 439, 440, 496, 497) was for his own convenience, rather than because of any directions received from the Government or the architects to do so.

In the appellant's view the Construction Progress Chart initially submitted to the Government (Government Exhibit No. 1) makes clear that the contractor had intended to proceed with the work on the Cyclorama prior to commencing with work on the office wing. The appellant says that even after the Revised Construction Chart was made changing the completion date from November 11, 1960 to January 25, 1961, it was still his intention to complete the Cyclorama building first. After carefully examining these exhibits and taking into account the testimony offered in connection therewith, we conclude that neither of them are of value in establishing the appellant's intentions in this respect.

Appellant's counsel attributes significance to the fact that the initial progress chart (Government Exhibit No. 1) showed a starting date of November 18, 1959 and a completion date of November 11, 1960. In the Board's opinion it would be surprising if a progress chart submitted on December 3, 1959 (Tr. 166) would show anything different, since both the starting date and the completion date are simply the beginning and the end of the contract period as established by reference to the receipt by the appellant of the notice to proceed on November 17, 1959 (Exhibit No. 5). The later progress chart (Government Exhibit No. 2), showing a starting date of January 25, 1960, and a completion date of January 25, 1961, is no more revealing. The

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starting date was the first day of work following the receipt by the contractor of revised drawings for certain footers in the Cyclorama area on January 22, 1960 (Exhibit E-16), with the completion date apparently established on the basis of allowing one year from the revised starting date for the completion of the work.

The lack of probative value of the progress charts was also shown by the testimony. In response to a direct question from the hearing officer as to what the initial progress chart reflected with respect to whether the Cyclorama building was to be constructed first, Mr. Orndorff stated:

It indicates that the major portion of the concrete work and the structural steel was to be completed at an early date which was a major part of the work on the project (Tr. 211).

Further questions by appellant's counsel elicited the following information with respect to Government Exhibit No. 1: (i) concrete walls have to be completed before the structural steel deck is erected; (ii) structural steel was to be completed about July 12, 1960, in accordance with the contractor's schedule; (iii) the starting and finishing dates for the contract work; and (iv) the appellant seemed to agree that the job could be done in the time approved by the architects. All of this information was apparently intended to demonstrate that the Cyclorama building was to be completed first.¹⁰⁵ The fatal weakness in this line of argument is that not only the Cyclorama building but also the office wing is comprised principally of concrete. This is clearly shown by the record and appears to have been acknowledged by Mr. Orndorff in his testimony concerning photographs introduced as Government Exhibits 10-J, K and L.¹⁰⁶

Testifying as to the appellant's claim of phase changes, the project supervisor invited attention to Government Exhibit No. 10-L, a photograph showing the forms for a pier of the greater ramp on the west side of the building and apparently taken in June 1960. As to the photograph he observed: "If he were primarily interested in getting the Cyclorama finished it seems foolish to go out and do work such as this indicates * * *" (Tr. 530, 531).

In so far as the record discloses, the contracting officer received no notice of the changes in phase claim for many months after actions by the Government or by the architects were supposed to have required the phase changes. The absence of such notice would represent some-

¹⁰⁵ No comparable effort was made to show the significance of the later progress chart (Government Exhibit No. 2). It is perhaps worthy of note, however, that while Mr. Longstreth acknowledged that his signature appears on the revised progress chart approved on December 19, 1959 (Tr. 166, 167), he unequivocally denied that the revised dates for commencing and completing the contract work were in his handwriting (Tr. 346, 347).

¹⁰⁶ "[A] It indicates that we were working on the entire area [at] the one time and coming up with the concrete work as opposed to our originally contemplating on concentrating on the cyclorama area." (Tr. 378).

thing of a paradox if we were to accept the testimony offered by appellant's witnesses at face value.

In view of the importance to be ascribed later to the appellant's inability to proceed with the work in the Cyclorama area as allegedly planned, the question quite naturally arises as to why the subject was not even mentioned in the appellant's claim letters of February 29, 1960 (Exhibit C-6), March 15, 1960 (Exhibit C-4d), and March 29, 1960 (Exhibit C-4a). Those letters pertain to the upward adjustment in the contract price desired by reason of accomplishing the foundation revisions called for by Drawings R-8 (1/19/60), R-10 (2/2/60), and R-12 (2/12/60). A more significant factor is the appellant's silence in this respect when confronted with the contracting officer's letter of June 3, 1960 (Exhibit E-15) expressing concern about the lack of progress on the Cyclorama. In the detailed reply of June 13, 1960 (Exhibit E-16), the appellant not only makes no reference to a change of phase but uses the following language to express his apparent satisfaction with the progress being made or that anticipated: "Based on the above and following facts, our best estimate is that the Cyclorama section and in most part the Office section will be closed in about 31 October 1960. *This bears out pretty well timewise with our original intentions.*" (Italics supplied.)

A year later (claim letter of June 12, 1961, Exhibit No. 1) the contractor appears to have advised the contracting officer for the first time that a change of phase had seriously interfered with the performance of the contract. Even then, however, the contractor merely asserts that due to various types of delays for which the Government or the architects were responsible, he was precluded from first proceeding with the construction of the 16' radius drum and the Cyclorama floor as planned. As a consequence he reportedly had to commence the 62' 6'' radius upper wall out of phase in order to avoid having to do such work during the winter of 1960-61 or postponing it to the late spring of 1961 with the resulting loss in efficiency and greatly increased costs of contract performance. Neither then nor in the supplemental information furnished more than a year later (letter of July 10, 1962, Exhibit S-5) did the contractor make any reference to having planned its work on the basis of completing the Cyclorama within 180 days. Neither of these letters makes any reference to Clause 21 (note 38, *supra*) which the appellant now says played so important a part in its plans for proceeding with the work. In fact, the record reveals that this clause was not even mentioned by the contractor until referred to by Mr. Orndorff in his testimony at the hearing in May of 1965.

A related question is the contractor's failure to make any effort to segregate costs as they were incurred. We conclude that this step would

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have been taken if, as the appellant now maintains, the changes in phase resulting from an assortment of Government actions had a catastrophic effect upon the contractor's performance. The claim as presented also fails to distinguish between phase changes attributed to the delay in the issuance of change orders and those involving other delays or interference on the part of the Government, the architects or the segregated contractors. As all of the change orders exclusive of Change Order No. 1 were accepted without reservation of any kind, they would appear to constitute an accord and satisfaction not only of the claims asserted with respect to such change orders but those that could have been asserted (or reserved) as well. It is not possible on this record, however, to separate the costs related to change orders from those attributable to other indicated causes.

One of the other indicated causes, an alleged lack of decisions on the job by the project supervisor and by Mr. Longstreth, is not borne out by numerous entries in all three of the diaries. These entries amply demonstrate that the project supervisor repeatedly made decisions respecting adherence to the specification requirements, as was confirmed by the testimony of Government witness Smith (Tr. 500-502). The project supervisor admittedly refused to make decisions in areas clearly outside the scope of his authority such as (i) request by the contractor for deviations from the specification requirements, or (ii) questions of interpretation of the specifications, in so far as they pertained to the design or appeared to involve conflicts between the various provisions or represented apparent omissions from the drawings (Tr. 501, 506-521, 559).

The entries in the various diaries also show that Mr. Longstreth frequently made decisions on the job related to questions of interpretation of the specification requirements in areas where (i) the project supervisor had considered the question presented to be beyond the scope of his authority, or (ii) as appears to have been more frequently the case, the questions had been reserved by the contractor's superintendent for presentation to Mr. Longstreth on his weekly visits to the job. There were extensive comments in the Longstreth diary, as to which he had requested no action on the part of the architects in California. Those entries represent, for the most part, decisions that had been made by Mr. Longstreth.

During the course of contract performance the contractor's appraisal of the importance of decisions by Mr. Longstreth relative to the orderly progress of the work appears to have been quite different from the picture presented by appellant's witnesses at the hearing. An entry recorded in the project supervisor's diary late in the project illus-

trates the variance between the contractor's view at that time and as later advanced at the hearing.¹⁰⁷

Assuming, however, that there was considerably more substance to the contractor's contentions respecting lack of supervision and other matters said to have caused phase changes, the contractor would still not be entitled to any relief in this forum. Upon careful consideration of the terms of Article 21 (note 38, *supra*) in the light of the other provisions of the contract and the conduct of the parties throughout the entire period of contract performance,¹⁰⁸ we are unable to conclude that Article 21 or any other clause contained in the contract established a sequence of work as a contract requirement. Absent a showing that the contract required the contractor to proceed in a particular way, the fact that the contractor may have intended to complete construction of the Cyclorama before it did any work in the office wing, or the fact that it may have intended to complete the 16' radius drum and the Cyclorama floor before it proceeded with work on the 62'6" radius wall, as well as the further fact that it may have been precluded from accomplishing some or all of these objectives by the actions of the Government, the architects, the segregated contractors, or all three combined, would not present a case cognizable under the Changes clause or any other clause contained in the contract.¹⁰⁹

Delay in the Issuance of the Notice to Proceed

Although not discussed in appellant's post-hearing brief, the contractor's initial claim letter of June 12, 1961 (Exhibit No. 1) advances

¹⁰⁷ " * * * I showed Mr. Orndorff the condition of the railing at Stairs #1. He thought it would be better to wait for Mr. Longstreth's visit next Wednesday and get an immediate settlement from him rather than to write to the architects about it. This is a question of the railing of the stairs not lining up with the railing of the lobby" (S (10/12/61), Government Exhibit No. 11).

¹⁰⁸ *General Electric Company*, IBCA-451-8-64 (April 13, 1966), 73 I.D. 95, 66-1 BCA par. 5507 (" * * * the overriding consideration in interpreting a contract is the intention of the parties as gleaned from the contract language employed, the circumstances surrounding the execution of the contract, and the conduct of the parties."); *Flora Construction Company*, IBCA-180 (June 30, 1961), 61-1 BCA par. 3081 ("It is well settled that the conduct of the parties before a controversy arises, is of great weight, if not controlling, in the interpretation of a contract * * *").

¹⁰⁹ *Weardco Construction Corporation*, IBCA-48 (September 30, 1957), 64 I.D. 376, 57-2 BCA par. 1440 ("The Board is unable to find in the facts of this case any basis for applying clause 3 of the General Provisions. * * * From the record in the present case it seems quite clear that the unavailability of the venturi tubes caused appellant to make a shift in the sequence of operations it had planned to follow, and ultimately led to a cessation of all work under the contract. * * *").

Reduced to fundamentals, appellant's claim is that by the delay in furnishing the venturi tubes the Government broke its contractual obligations and thereby made more costly appellant's performance of its own obligations under the contract. Clause 3 was not designed as a mechanism for the adjustment of claims for breach of contract, and the rule of the *Rice* case that time, not money, is the measure of equitable adjustments for delay, applies to it as well as to clause 4").

See also *Lenry, Inc. et al. v. United States*, 156 Ct. Cl. 46 (1962), affirming Appeal of *Lenry, Inc.*, and *William P. Bergan, Inc.*, ASBCA No. 4674, 58-2 BCA par. 1849, in which the Court stated: " * * * there is no indication in the record that defendant knew, or should have known, of the particular method of operation originally selected by the plaintiffs, since it formed no part of this contract. * * *"

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the argument that the Government delayed the issuance of the notice to proceed and that this also impeded the contractor in the performance of the contract.

The bids were opened on September 29, 1959. The notice to proceed (issued on November 16, 1959) was acknowledged by the contractor on November 17, 1959 (Exhibit No. 3), establishing November 18, 1959, as the first day of the 360-day contract period. As the contract was in excess of \$200,000, it was subject to approval by higher authority (Exhibit No. 6). The approval was obtained on October 19, 1959 (Exhibit No. 2). The approved contract was delivered to the contractor for execution on October 28, 1959 (Exhibit No. 1), in confirmation of the award made on September 30, 1959 (Exhibit No. 2).

From the record it appears that the contracting officer may have delayed the issuance of the notice to proceed because of advice from the contractor of an anticipated difficulty in procuring steel (Exhibit A-1). Once the contractor was notified of approval of the contract, he was in a position, of course, to place orders for required materials and to otherwise prepare for the performance of the contract.

We make no determination as to whether the 49 days that elapsed between the date the bids were opened on September 29, 1959, to the date the contractor received the notice to proceed on November 17, 1959, represented an unreasonable delay in issuing the notice to proceed. If we were to conclude that the Government unreasonably delayed the issuance of the notice to proceed, we would be without any authority to provide relief.¹¹⁰

Specific Claims

Claim Nos. 1, 2, 3, 4, 5, 6, 9, 10, 13, 14, 18, 19, 20, 21 and 22

All of the above-enumerated claims¹¹¹ are predicated upon delays by the Government or the architect¹¹² or upon changes in phase from the contractor's programming allegedly attributable to such delays.

¹¹⁰ *Clifford W. Gartzka*, IBCA-399 (December 24, 1964), 71 I.D. 487, 65-1 BCA par. 4602 ("Since the contract does not authorize a price adjustment for a delay in giving notice to proceed, a claim for additional compensation on the ground that the giving of notice to proceed was unduly delayed is not cognizable by the Board. Such a claim is one for breach of contract, as distinguished from a claim under the contract. In the absence of specific authorization for their consideration, claims for breach of contract arising from Government delay are beyond the jurisdiction of contracting officers and boards of contract appeals to determine * * *").

¹¹¹ The numbering system employed corresponds to that used by the contractor in the initial claim letter of June 12, 1961 (Exhibit No. 1) and maintained in the supplemental information forwarded with the letter of July 10, 1962 (Exhibit S-5), as well as in the appellant's post-hearing brief (pp. 2-9).

¹¹² At least one of the claims also involves alleged interference or delays by segregated contractors (Tr. 195), but no effort has been made by the appellant to separate the costs attributable to this cause from those that resulted from other causes of delay.

A brief resume of the claims in question with appropriate references to the findings, the exhibits and the transcript appears below.

*Claim Nos. 1 and 2 (\$10,387.16)*¹¹³—Additional cost of plywood and form lumber, cutting and form fabrication labor. The two claims were consolidated by the letter of July 10, 1962 (Exhibit S-5). Both claims are based upon a phase change which allegedly resulted from Government delays (Findings, p. 59; Tr. 14-18, 142-145, 214, 474).

Claim Nos. 3 and 4 (\$7,430.40)—Additional cost of field overhead (\$4,298.40) and general overhead (\$3,132) during the period from December 1, 1959 to January 25, 1960. The amount claimed represents stand-by costs pending decisions by the Government and the architects on the revisions to the foundation required by reason of the condition encountered at certain of the footers (note 6, *supra*), as well as other delays for which the Government or the architects were allegedly responsible (Findings, pp. 59, 60; Tr. 18-27, 145-149, 214, 215, 474).

Claim Nos. 5 and 6 (\$2,673.46)—Additional labor and equipment costs attributable to rephasing and stretch-out of the work for which the Government was allegedly responsible and which necessitated completion of the foundation under adverse weather conditions with a consequent decrease in labor efficiency and an increase in cost for equipment and supplies. The consolidation of the two claims was effected by the letter of July 10, 1962 (Exhibit S-5), which also reduced the amount of the aggregate claim to the figure shown. (Findings, pp. 60, 60a; Tr. 27-32, 149-151, 474).

Claim No. 9 (\$2,904.48)—Additional cost of rental for steel scaffolding incurred as a result of phasing changes from December 11, 1959 to December 12, 1960, for which the Government is said to have been responsible and which resulted in the contractor undertaking to commence the Cyclorama wall before the Cyclorama floor to avoid winter conditions for work on the wall. The amount of the claim was increased to the figure shown above by the letter of July 10, 1962 (Exhibit S-5) which also provided additional details as to the basis for the claim (Findings, p. 61; Tr. 37-42, 156-159).

Claim No. 10 (\$1,200)—Additional amount paid to the structural steel subcontractor for adding staging required by reason of revision of work phasing to advance the progress of the 62' 6" ribbed wall out of sequence and prior to construction of the 16' radius wall. The change in phasing is attributed to delays by the Government and the architects in connection with the foundation revisions and delays by the architects including those related to construction joints. Appellant's Exhibit "A" shows that the \$1,200 involved was billed to the appellant

¹¹³ Note 2, *supra*.

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as an extra by the subcontractor concerned (note 47, *supra*; Findings, p. 62; Tr. 42-48, 159-166, 220).

Claim No. 13 (\$466.50)—Additional cost of equipment required for re-excavation and backfill of columns J to Q allegedly due to original work stoppage and resultant weathering of footer excavations. The letter of July 10, 1962 (Exhibit S-5) reduced the claim to the amount shown by eliminating the \$165.60 formerly claimed for labor costs. (Findings, p. 63; Tr. 50-52, 170-172).¹¹⁴

Claim No. 14 (\$142.60)—Additional cost of removal, cleaning and replacement of reinforcing steel ramp pier, south and west wall footings, purportedly incurred by reason of weathering through work stoppages for Government revisions and decisions—two days (Findings, p. 64; Tr. 52-53, 172-174, 474).

Claim No. 18 (\$3,357.46)—Additional cost of labor because of wage increases during the period from September 15, 1960 to April 30, 1961, allegedly necessitated by work stoppages for revisions, rephrasing of work and lag time for decisions of the Government. The amount shown includes taxes and insurance and reflects the reductions made in the initial claim by the letter of July 10, 1962 (Exhibit S-5; Tr. 57-60, 178-180, 222, 474).

Claim No. 19 (\$31,500)—Additional cost of general overhead allegedly incurred by reason of work stoppages for revisions, rephrasing of work and lag time for decisions of the Government from November 1, 1960 to September 15, 1961 @ \$3,000 per month. According to Mr. Orndorff, the figure shown was arrived at in his bookkeeping department by comparing the progress against the expenditures made on the cost control which reflected a loss of that amount of money (Findings, p. 66; Tr. 59, 180-183, 221-222).¹¹⁵

Claim No. 20 (\$12,787.50)—Additional cost of field overhead expenses allegedly incurred by reason of work stoppages for revisions, rephrasing of work and lag time for decisions of the Government from November 1, 1960 to September 15, 1961. Mr. Orndorff explained that by the term "rephrasing of work" he means changes in his construction program that were brought about by delays of the Government which interfered with progress of the work (Findings, p. 66; Tr. 60-61, 183-189, 221-222, 474).

¹¹⁴ Footnote 2, *supra*.

¹¹⁵ The partial explanation and justification furnished for various claims by the letter of July 10, 1962 (Exhibit S-5) did not include Claim Nos. 19, 20, 21 and 22. The statement in the letter "The balance of this information will be submitted to you within the next few days" presumably refers to these claims. No further explanation or justification of these several claim items was furnished to the Government, however, prior to the hearing on the appeal in May of 1965.

Claim No. 21 (\$7,049.75)—Additional cost of equipment by reason of work stoppages and phase changes allegedly resulting from revisions and lag time in decisions by the Government (Findings, p. 66; Tr. 61–63, 189–192).

Claim No. 22 (\$83,404.66)—Additional labor cost allegedly incurred by reason of work stoppages, phase changes and adverse weather resulting from revisions and lag time for decisions by the Government, as well as from interference by segregated contractors. The amount shown above includes taxes and insurance. As indicated, some part of the claim is attributed to alleged interference by segregated contractors. The appellant has made no effort to separate the portion of the claim related to this cause, however, and we are unable to do so.

Although the amount claimed for Claim No. 22 covers labor costs throughout the project from beginning to end (Tr. 193), Mr. Orndorff asserted that there was no duplication of labor costs included in other items. He distinguished the claim from the other 21 items on the grounds that the other items refer to a specific phase or delay, while the instant claim represents recorded costs of lost time, generally speaking. (Findings, p. 67; Tr. 74–80, 137–139, 192–198, 473–476).

In the post-hearing brief appellant's counsel states that due to the regrettable lapse of time, the majority of the claims must be treated in only a general fashion (appellant's post-hearing brief, p. 14). The delay in processing the claims does not explain, of course, the appellant's failure, when costs were incurred, to segregate them in relation to the principal claim items.¹¹⁶ In an effort to partially overcome this failure, appellant's Exhibits C, D, E, F and G were offered into evidence. All were admitted over the strenuous objection of Government's counsel. From an examination of the exhibits and the testimony offered in connection therewith, it is apparent that all of the principal items of claim have been presented on a total cost basis, as was acknowledged in testimony offered on behalf of the appellant (Tr. 469–473).

Appellant's counsel asserts that the best evidence that the claim should be allowed in its entirety is to be found in a letter written by the California architects as early as June 30, 1961 (appellant's post-hearing brief, p. 81). In support of this statement the following passage is quoted from the letter:

Contractor's claim for extra payment is based on the following factors:

1. Delay in site preparation by Preliminary Grading Contractor.
2. Delay due to necessity for redesigning Cyclorama foundations.
3. Delays caused by supervision policies of the Architect.

¹¹⁶ *H. R. Henderson & Co. et al.*, on motion for reconsideration, ASBCA No. 5146, 61–2 BCA par. 3166 (“* * * Whether there existed a formal change order or not, appellant, acting as a prudent contractor and aware of its potential claim, should have kept records reflecting the extra costs attributable to the de facto change.”).

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4. Added costs due to a different construction sequence than originally contemplated by the Contractor.

5. Changes in scope of work.

We have the following comments to make regarding the above factors:

1. We believe Contractor's statement is correct, but have no direct knowledge regarding "Preliminary Grading." (Exhibit D-1.)

Contrary to the assertions of appellant's counsel, the letter in question directly assails or seriously undermines the appellant's position on all of the principal elements of the claim, as demonstrated by the California architects' comments upon factors 2, 3 and 4.¹¹⁷

We need not concern ourselves further, however, with the merits of the various claims listed above. Without exception, all of such claims are based upon delays of the Government or the architects, or by both, or upon changes in phase of the contractor's operations said to have been necessitated by such delays or by interference from the segregated contractors. Assuming that the alleged delays by the Government and by the architects and the resultant changes in phasing, as well as interference by the segregated contractors, had been established by unassailable evidence, we would have no authority to provide re-

¹¹⁷ "2. It is correct that Cyclorama foundations required redesign and that construction was delayed as a result. The Contractor's account of this change omits the following relevant considerations:

"a. Contractor requested a large extra payment for this work and we think it has been approved and paid * * *.

"b. [Sets forth the facts relating to Orndorff's use of an underweight hammer for pile driving.]

"c. Location of building as established by National Park Service did not correspond to that used for foundation investigation and contract drawings. This does not affect Contractor's claim for extra payment but does affect Foundation Engineer's and our responsibility for initial foundation design. We do not feel that we should accept any responsibility for delay in foundations. The supplemental foundation report was received Friday, January 15, 1960 and pile driving information was sent by telegram on Monday, January 18th.

"3. Regarding the question of supervision delays, Longstreth frequently phoned us about field problems and the decisions in these instances were no more delayed than for a typical local job. See further comments below.

"4. The extra requested for the change in construction sequence apparently represents most of the total claim. So far as we know, the Contractor changed the sequence without formal notification to the Owner or Architect that it would be changed or that any extra cost would be involved. If so, we should think he must have forfeited any right to extra payment.

* * * * *

"Several references are made to delays due to supervision procedure. The Contract Documents clearly designate Neutra and Alexander as the Architects and set forth their location without question. * * * As far as we are aware, most of the decisions which have been referred to this office have been the result of a desire on the part of the Contractor to modify something called for by the Contract Documents for one reason or another. * * *

"In any event, we deny that supervision delays, except those attributable to the Contractor's own requests or problems, have any weight in the Contractor's claim for additional funds. Attention is also called to ART. 33D, requiring the Contractor to give written notice within five days if any detail drawing, after it is submitted after the Contract Drawings, calls for additional costs. Also note Art. 49 requiring that shop drawings be submitted no later than four weeks in advance of the time corrected shop drawings are required. * * *" (Letter of June 30, 1961, Exhibit D-1).

lief in the circumstances of this case.¹¹⁸ Accordingly, Claim Nos. 1, 2, 3, 4, 5, 6, 9, 10, 13, 14, 18, 19, 20, 21 and 22 are hereby dismissed as outside the scope of our jurisdiction.

Claim Nos. 7, 8, 11, 15, 16 and 17

The above-listed claims are all based upon instructions allegedly received from the project supervisor or from Mr. Longstreth which, in the appellant's view, called for the performance of work not required by the terms of the contract. In denying these claims the contracting officer relied principally upon the contractor's failure to adhere to the provision of the contract¹¹⁹ respecting changes (note 91, *supra*), specifications and drawings,¹²⁰ and intent of documents.¹²¹ In addition, the contracting officer called attention to the following: (i) comparatively early in performance the contractor was specifically told that he was not to proceed with any contemplated changes without written authorization from the contracting officer; (ii) according to the report submitted by the project supervisor, all extra work and changes requested by the Government which the contractor indicated at the time would result in extra costs were covered by change orders;

¹¹⁸ *United States v. Utah Construction and Mining Co.*, note 14, *supra*; *United States v. Rice*, note 95, *supra*; *Leury, Inc. v. United States*, note 109, *supra*; *American Cement Corporation*, note 16, *supra*; *Simmel-Industrie Meccaniche Societa Per Azioni*, note 17, *supra*; *Seal and Company*, note 85, *supra*; *W. R. S. Pavers, Inc.*, note 86, *supra*; *Electric Properties Co.*, note 92, *supra*; *Cosmo Construction Company*, note 96, *supra*; *Peter Kievit Sons' Company*, note 96, *supra*; *Tree Land Nursery, Inc.*, note 102, *supra*; and *Wearco Construction Corporation*, note 109, *supra*. See also *Weldfab, Inc.*, IBCA-268 (April 11, 1961), 68 I.D. 107, 61-1 BCA par. 3005.

¹¹⁹ Findings, pp. 36-41.

¹²⁰ "The Contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy either in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without this determination shall be at his own risk and expense. * * *" (Clause 2; Specifications and Drawings, Standard Form 28A, March 1953 Edition, Specifications, Exhibit "A").

¹²¹ "ART. 33. Intent Of Documents * * * D. The general character of the detail work is shown on the Contract Drawings, but minor modifications may be made in the shop drawings. The Architect may furnish additional details to more fully explain the work, and same shall be considered a part of the Contract. Any work executed before receipt of such details, if not in accordance with same shall be removed and replaced or adjusted, as directed, without expense to the Owner. Should any detail submitted later than the contract drawings be, in the opinion of the Contractor, more elaborate than the scale drawings and the specifications indicate, written notice thereof shall be given to the Architect within (5) days of receipt of same. The claim will then be considered, and if justified, said detail drawings will be amended or the extra work authorized. Non-receipt of such notice shall relieve the Owner of any claim." (General Provisions, Specifications, p. A-8, Exhibit "A").

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and (iii) the contractor accepted without qualification the 25 change orders issued during the course of contract performance.¹²²

Claim Nos. 7 and 8 (\$570)—The supplemental data forwarded with the contractor's letter of July 10, 1962 (Exhibit S-5), consolidated Claim No. 7 (\$280) and Claim No. 8 (\$290) as initially filed on June 12, 1961 (Exhibit No. 1). The following explanation is offered for the combined claim: "The work of machine re-excavation of footers Q, U and J, and excavation of excess material in the lobby #1 and guide room area, was performed on the dates of January 29 and February 1, 8, 9, 17 and 18, 1960. This work was necessitated by sluffing of footer excavation during the period of work stoppage ordered by the agency and failure of the rough grading contractor to complete its excavation. On February 22, 1960, contractor was compelled to remove a portion of stone fence not included in original excavation quantities * * * This work required 14 hours time of a fully operated backhoe @ \$35 per hr. and 4 hrs. time of a fully operated D4 dozer @ \$20 per hr.—Total Equipment Cost—\$570."

The contracting officer denied both of the claims on the grounds: (i) it was the contractor's responsibility to maintain the footing excavations in proper shape until the concrete was placed; (ii) the removal of the stone wall at the south end of the building was performed by another contractor because the contractor's quotation of October 24, 1960, was considered unreasonable for doing that work; and (iii) the project supervisor remembers that the contractor's superintendent complained about the level of the ground in the general area of the office (lobby number 1 and guide room) but excavation for footings proceeded in this area and, as no claim for extra work was presented, no change orders were issued covering this work.

As to the stone wall involved in Claim No. 7, the contracting officer appears to have overlooked the fact that the contractor is claiming for the costs involved in removing a portion of the stone wall at the south end of the building on February 22, 1960 (V (2/22/60), Appellant's Exhibit "J"). This could hardly have been affected by what transpired on October 24, 1960 (Exhibit C-7g), or thereafter (Exhibit C-7h). The finding that no change orders were issued covering excavation in the area of lobby number 1 and the guide room was contradicted by the testimony offered by the Government at the hearing. Asked about an entry pertaining to this work in the diary of the contractor's superintendent on February 18, 1960 (Appellant's Ex-

¹²² We have previously found that the contractor's letter of March 29, 1960 (note 73, *supra*), excepted Items 2 through 7 of the claim submitted for foundation revisions from the terms of Change Order No. 1.

hibit "J"), the project supervisor testified that the work in question was performed pursuant to Drawing R-4,¹²³ and that coverage therefor was provided by Change Order No. 3 (May 10, 1960), under which the contractor was paid the sum of \$499.98 (Tr. 521-522). No effort was made to impugn this testimony upon cross-examination and no rebuttal testimony was offered.¹²⁴

The Government offered no testimony to refute Mr. Orndorff's assertion that the work involved in the re-excavation of footers at Columns Q, U and J was at the direction of the project supervisor. Especially noteworthy is the fact that all of such work, as well as the removal of a portion of the stone wall at the south end of the building, was performed during a time when the contracting officer acknowledges that changes in the work were being made without written authorization from him (Contracting officer's letter of February 29, 1960, Exhibit F-1). While the project supervisor testified that the portion of the stone wall removed by the contractor was to provide access to the site, this view of the matter appears to have been advanced for the first time at the hearing (Findings, p. 61). There is nothing in the record to indicate that the contractor has been paid for this work.

We find that the appellant has shown by a preponderance of the evidence (i) that the work covered by Claim No. 7 was in excess of the contract requirements; (ii) that it was performed at the direction of the project supervisor with the actual or constructive knowledge of the contracting officer; and (iii) that the contractor has not been compensated therefor. So finding, Claim No. 7 is hereby allowed in the amount claimed of \$280.¹²⁵

We find, however, that the appellant has failed to show by a preponderance of the evidence¹²⁶ that he is entitled to additional compensation for excavating excess material in the lobby No. 1 and guide room area. Claim No. 8 is therefore denied.

Claim No. 11 (\$1,700)—The claim is described in the contractor's letter of June 12, 1961 (Exhibit No. 1) as involving the "extra cost of framing and polyethylene sheeting to enclose structure, and heating for winter work." The amount claimed is comprised of the sum of \$500 for polyethylene material and labor and the sum of \$1,200 for temporary heat for a 3-month period at the rate of \$400 per month.

¹²³ Commenting upon the relationship of Drawing R-4 to the contract price in the letter of March 21, 1960 (Government Exhibit No. 5), the contractor states: "Addition to contract for sum of \$615.70 in accordance with our submittal dated 3/15/60."

¹²⁴ For the testimony offered with respect to these claims, see transcript, pp. 33-37, 151-156, 256-257, 280-282, 497-500, 553.

¹²⁵ *H. B. Fowler & Co., Inc.*, IBCA-294 (October 23, 1961), 61-2 BCA par. 3168.

¹²⁶ *R. E. Hall Construction Company, et al.*, IBCA-465-11-64 (September 26, 1967), 67-2 BCA par. 6597.

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In denying the claim the contracting officer referred to Article 20 of the specifications¹²⁷ under which the contractor was required to furnish "all temporary heat required for the protection and completion of the work." He also noted, however, that when the action was taken in late January of 1961, the contractor was caught by severe winter weather with an open building at a time when he was seriously behind in his schedule.

Mr. Orndorff testified that the structure was enclosed and the heat provided at the direction of the project supervisor. Contemporary entries in the project supervisor's diary do not support this view of the matter (S (1/27/61) (1/30/61) and (1/31/61), Government Exhibit No. 11). While the entry in the diary of the contractor's superintendent for January 30, 1961 (Appellant's Exhibit "J") may be regarded as corroborating Mr. Orndorff's testimony in certain respects, it does not appear that the superintendent attended the conference of that date in which discussions were held between Mr. Orndorff and the project supervisor. This may account for the lack of specificity in the language employed in describing the outcome of the conference and the reference to matters of apparent importance as to which no testimony was offered by Mr. Orndorff. The project supervisor's account of the conference makes clear, however, that the comments made by him were presented as suggestions which Mr. Orndorff was free to accept or reject in the exercise of his discretion.¹²⁸

In the supplemental data furnished with the letter of July 10, 1962 (Exhibit S-5), appellant's counsel states:

Enclosure and heating of the building was performed by the contractor for the benefit of the government and at the government's request, to expedite the work in winter weather conditions, which would have excused prosecution of the work. The contracting officer held a contrary view, however, as six weeks before the structure was enclosed he had refused Mr. Orndorff's request to close down the job (S (12/19/60), Government Exhibit No. 11).

The contractor did have a right to extensions in time for performance because of time lost by reason of unusually severe weather, and this was freely acknowledged by the Government throughout performance of the contract. But he clearly had no right to a formal shut-

¹²⁷ "ART. 20. Temporary Heat: The Contractor shall furnish all temporary heat required for the protection and completion of the work. Temporary heating apparatus shall be installed and operated in such a manner that the finished work will not be damaged thereby." (Special Provisions, Specifications, p. B-6, Exhibit "A").

¹²⁸ Acceptance of suggestions made by the contracting officer or other Government representative does not constitute a change within the meaning of the Changes clause. *Phelps Construction Company of Wyoming*, ASBCA No. 11004, 65-2 BCA par. 5294; *Twombly Tree Experts, Inc.*, ASBCA No. 6456, 61-1 BCA par. 3001.

down order because during mid-winter in Pennsylvania he was confronted with cold weather within the range of temperatures normally encountered in that State at that time of year. During contract performance the contractor appears to have been of the same view. Not only did he fail to protest the contracting officer's denial of his request to close down the job in mid-December of 1960, but, in so far as the record discloses, he had continued work throughout the preceding winter without even requesting a winter shutdown. Another factor militating against the appellant's position is the fact that no claim for the costs incurred appears to have been made until over five months after the structure was enclosed.¹²⁹

We find that the contractor has failed to show by a preponderance of the evidence that the structure was enclosed and temporary heat furnished as a result of a direction received from the project supervisor.¹³⁰ We further find that in so proceeding the contractor accepted a suggestion from the project supervisor as a means of discharging his contractual obligations to prosecute the work and to provide temporary heat.

Claim No. 15 (\$113.25)—The claim is for the "extra cost of water stop doors #10 and #28, 90' 6" radius wall placed at direction of architect * * *" (Claim letter of June 12, 1961, Exhibit No. 1). The contracting officer offered the following comment upon the claim:

The Project Supervisor states that "this water stop was required by Architect on a visit to the job. Although not specifically shown on Drawings (Exhibit B), the Architect stated it was similar to other areas where it was shown on Drawings (Exhibit B). No request for payment was made when the work was performed" (Findings, p. 64).

Contemporaneous entries in the diary of the contractor's superintendent indicate, however, that the contractor considered the work involved to be in excess of the contract requirements for which he expected to be paid an additional amount (V (5/4/60) (5/10/60) Appellant's Exhibit "J").

Mr. Orndorff's testimony respecting this claim was rather confused. Initially he related the claim to two water-tight doors (#10 and #28) in the 90'6" radius wall and described a water stop as a weather stripping arrangement to make the door tight. Later he acknowledged, however, that the changes involved were not for water stop doors but for the insertion of prefabricated water stops in the wall adjacent to Doors

¹²⁹ The testimony relating to the claim is reported in the transcript at pages 48-49, 134, 168-170 and 475.

¹³⁰ Note 126, *supra*. See also *B & E Constructors, Inc.*, IBCA-547-2-66 (August 28, 1967), 67-2 BCA par. 6548.

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Number 10 and 28. Mr. Orndorf clearly identified Mr. Longstreth, however, as the one who gave the "Instructions" upon which the claim is based.

Mr. Longstreth testified that the drawings do show water stops at the locations in question with Doors No. 10 and 28 being adjacent to such locations at the lower and upper floors, respectively. In support of this statement he called attention to and elaborated upon the requirements shown on Sheets D-2 and D-4 of the contract specifications (Exhibit "A"). Mr. Longstreth also testified that these requirements had been pointed out to the contractor's superintendent at the time the question arose.¹³¹ Although contractor's superintendent had firsthand knowledge of the matter and although he testified later in the proceeding, no testimony was elicited from him respecting the instant claim. It appears that no request for payment was made for the work involved in the instant claim for more than a year after the work was performed (Exhibit No. 1).

The claim is denied for failure of the appellant to sustain its burden of proof.¹³²

Claim No. 16 (\$1920)—The contractor's letter of June 12, 1961 (Exhibit No. 1) describes the claim as for the "extra cost of raising floor of transformer vault 6'' at direction of project supervisor * * *." The contracting officer noted:

No request for extra payment was made when the work was performed (Findings, p. 65).

Mr. Orndorff testified that the work involved a matter of fill to bring the grade up to receive the floor. Asked to comment upon the quoted remark of the contracting officer, he stated: ¹³³

I expected that we would get paid eventually but I was informed on several occasions to accumulate the costs of certain items and estimate them at a later date.

The appellant has failed to call our attention to anything in the record to support this statement by Mr. Orndorff and (exclusive of the work covered by Change Order No. 1, that we have previously commented upon at length) we are aware of none. Certainly the contractor was not told to accumulate costs for the purpose of supporting this particular claim, for the contractor's own records establish that the project supervisor contemplated that the work would be performed at no additional cost to the Government.¹³⁴ The project supervisor

¹³¹ Tr. 53-55, 134-136, 174-177, 257-261, 277, 279, 474.

¹³² Note 126, *supra*.

¹³³ Tr. 56-57.

¹³⁴ " * * * Smith ask to raise floor elev. of Transf. Vault 6'' without additional reimbursement. Informed him I would have to clear same with Camp Hill Office. * * *" (V (5/27/60), Appellant's Exhibit "J").

was not disabused of this understanding until more than a year after the services in question were rendered (claim letter of June 12, 1961, Exhibit No. 1).¹³⁵

The appellant has failed to show by the preponderance of the evidence that the services involved in the instant claim were performed as the result of any reasonable expectation of payment therefor in addition to the contract price. The claim is therefore denied.¹³⁶

Claim No. 17 (\$28.80)—The claim is for the "extra cost of additional reinforcing steel in 90'6" radius wall over corridor #5 placed at direction of the architect * * *." (Claim letter of June 12, 1961, Exhibit No. 1). The contracting officer denied the claim, noting:

The Project Supervisor states that "a supporting beam had been concreted without the required amount of reinforcing steel that was clearly shown on Drawings" (Exhibit B). To correct this omission, additional steel was placed in another member to assure stability of this section of the structure. This was far less expensive than ripping out and re-concreting beam with sufficient reinforcing (Findings, p. 65).

The only testimony offered with respect to this claim was provided by Mr. Orndorff who stated (i) the work was performed at the request of the architect, (ii) it was not shown on the contract drawings, and (iii) compensation was expected.¹³⁷

In view of this testimony and the absence of any evidence being offered to support the contracting officer's findings, Claim No. 17 is allowed in the amount claimed of \$28.80.

Mistake In Bid Claim—(\$14,004)

In the course of the hearing appellant's counsel amended the claim as previously filed to include a claim for mistake in bid resulting from an error by the contractor's estimator when the bid was prepared in September of 1959. Apparently, the error was not discovered for almost eleven months, for the matter appears not to have been brought to the attention of the contracting officer until receipt of the contractor's letter of August 10, 1960 (Exhibit G-30). The contractor's request for relief was referred to the Comptroller General. In Decision No. B-14828 of March 7, 1962 (Exhibit G-31a), relief was denied on the ground that the error was unilateral in nature without any evidence of actual or constructive notice of the error to the contracting officer at the time of award. In support of the argument that the Board should provide relief despite the adverse ruling by the Comptroller General,

¹³⁵ Tr. 56-57, 177, 276-277, 474, 540-541.

¹³⁶ Note 126, *supra*.

¹³⁷ Tr. 57, 177-178, 474.

appellant's counsel states:

We believe that the ruling on this question should not be predicated solely upon Contract Law but should be predicated upon the Law of Restitution and specifically upon the Theory of Unjust Enrichment (Appellant's post-hearing brief, p. 79).

Whatever the basis upon which the claim is asserted, it is clear that we are without jurisdiction in the matter.¹³⁸ Accordingly, the claim is hereby dismissed.

CONCLUSION

1. Claim Nos. 1, 2, 3, 4, 5, 6, 9, 10, 13, 14, 18, 19, 20, 21 and 22 are dismissed.
2. Claim Nos. 7 and 17 are allowed.
3. Claim Nos. 8, 11, 15 and 16 are denied.
4. The mistake-in-bid claim is dismissed.

WILLIAM F. MCGRAW, *Member.*

WE CONCUR:

DEAN F. RATZMAN, *Chairman.*

THOMAS M. DURSTON, *Deputy Chairman.*

GERALDINE H. RUBENSTEIN

A-30765

Decided October 26, 1967

Oil and Gas Leases: Acquired Lands Leases—Oil and Gas Leases: Description of Lands

Former Departmental regulation 43 CFR 192.43(b), which prescribed the manner in which expired, canceled, relinquished and terminated oil and gas leases should be listed for further leasing, did not require a land office to describe listed acquired lands in the same manner as a lease offeror in describing the same lands in his offer, and where a portion of a section of acquired land the external limits of which section were surveyed under the public land survey system was described in a list of available lands by

¹³⁸ *Hyde Park Clothes, Inc. v. United States*, 114 Ct. Cl. 424 (1949) ("* * * the question is a legal one of whether, under the circumstances, the plaintiff is equitably entitled to reformation of its contract. The contracting officer had no authority under any article of the contract to determine such a question and plaintiff's course in addressing its claim to the Comptroller General, and then to this Court, was the proper one. * * *"); *The Electro Nuclear Systems Corporation*, ASBCA No. 10746, 66-2 BCA par. 6008 ("* * * appellant claims that to allow the Government to accept the fruits of performance without paying full value allows unjust enrichment contrary to all principles of fairness and equity. This claim is in effect a request for relief outside the terms of the contract on the basis of QUANTUM MERUIT. * * *"); *Cosmo Construction Company*, IBCA-412 (February 20, 1964), 71 I.D. 61, 1964 BCA par. 4059; *Cf. Southern Athletic Company, Inc.*, ASBCA No. 10674, 66-2 BCA par. 5777.

section number, excluding a tract which was not surveyed as a legal subdivision of the section and which was not described by metes and bounds but only by a designation given in a private survey of the tract, the posting was not deficient so as to make the land unavailable for leasing.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mrs. Geraldine H. Rubenstein has appealed to the Secretary of the Interior from a decision dated December 2, 1966, whereby the Office of Appeals and Hearings, Bureau of Land Management, canceled her acquired lands oil and gas lease BLM-A 077197 and affirmed a decision of the Eastern States land office insofar as it rejected in part Cities Service Oil Company's noncompetitive acquired lands oil and gas lease offer BLM-A 077143.

Cities Service filed its lease offer on January 27, 1964, pursuant to the Mineral Leasing Act for Acquired Lands, 30 U.S.C. §§ 351-359 (1964), for inclusion in a drawing of offers simultaneously filed, describing therein the following lands in T. 5 N., R. 1 W., Wash. Mer., Adams County, Mississippi:

SECTION 9: All that part lying East of Sandy Creek, except the north 160 acres thereof.

SECTION 14: That part lying East of Sandy Creek and North of the Woods Road

SECTION 15: All except lots 11 and 12

SECTION 24: All except lot 22

SECTION 29: Lots 1, 3, 4, 5

The lands were described in the lease offer in the same manner as in the January 1964 listing of lands in expired, canceled, relinquished and terminated oil and gas leases posted by the land office pursuant to the regulation then in effect (43 CFR 192.43(b), 24 F.R. 9846 (1959)).¹ Cities Service's offer was awarded first priority in a drawing which included Mrs. Rubenstein's lease offer BLM-A 077197. The latter described the same lands in sections 15, 24 and 29 that were described in BLM-A 077143, but it included metes and bounds descriptions of the portions of sections 15 and 24 which were excepted from the offers.

On August 25, 1964, Mrs. Rubenstein filed a protest against acceptance of the offer of Cities Service as to the lands in sections 15 and 24, asserting that, inasmuch as sections 15 and 24 were never subdivided or lotted by the Federal Government and the official plats of survey do not show the existence of any lots 11 and 12, section 15,

¹ By a decision dated August 18, 1964, and pursuant to protests filed by Charles J. Babington and Verne L. Culbertson, lease offer BLM-A 077143 was rejected as to the lands in sections 9 and 14 for the reason that the lands were not described by metes and bounds as required by 43 CFR 3212.1, formerly 43 CFR 200.5. No appeal was taken from that decision, and the propriety of that action by the land office is not now in issue.

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or lot 22, section 24, the exceptions must be shown by a correct metes and bounds description tied to a surveyed public corner as required by departmental regulations. By a decision dated September 11, 1964, the land office sustained Mrs. Rubenstein's protest and rejected Cities Service's lease offer as to the lands described in sections 15 and 24. Subsequently, on September 30, 1964, Mrs. Rubenstein's offer was reinstated as to those lands, and on October 19, 1964, lease BLM-A 077197 was issued to her for the same lands, effective November 1, 1964.

Cities Service appealed to the Director, Bureau of Land Management, from the rejection of its offer as to the lands in sections 15 and 24, asserting that, since the land office knew of the metes and bounds description of the excepted lots, it must have been its intent in describing the exceptions by lot numbers to incorporate by reference the metes and bounds descriptions of the lots contained in an existing oil and gas lease, or that, if the posted description was not adequate, the land office listing of the land was itself inadequate under regulation 43 CFR 192.43(b), and the land should not be considered available for leasing until such time as it has been properly posted.

The Office of Appeals and Hearings noted that the official plats of survey for T. 5 N., R. 1 W., do not reflect the division of sections 15 and 24 into lots, that it appeared that terminated oil and gas lease BLM-A 012899 originally included the entirety of those sections, that the lessee, by assignment approved May 27, 1952, transferred to Shell Oil Company lands referred to as lots 11 and 12, section 15, and lot 22, section 24, that the assignment, as filed, contained a description of the tracts assigned by the lot numbers used in the plat of a private survey, a copy of which was attached to the assignment, and also contained a metes and bounds description tied into the official survey made by the Government, and that lease BLM-A 012899 thus contained a metes and bounds description of the lands in sections 15 and 24 which were not to be made available for further leasing. It then found that the lands excepted from sections 15 and 24 must be treated as unsurveyed lands and that it was incumbent upon the authorized officer of the Bureau of Land Management to list the lands in question by the metes and bounds description of the lands in the lease which had terminated. This, it stated, was not done. The Office of Appeals and Hearings observed that while the Department has held that the burden and responsibility for adequately describing unsurveyed land is upon the applicant, it is assumed that the list of lands has been posted in accordance with the regulations so as to make the lands available for further leasing.

ing. It concluded that in view of the manner in which the lands in question were listed by the land office the lands did not become available for leasing at that time, that the lands would become available for the filing of lease offers after they have been posted in accordance with applicable regulations, and that lease BLM-A 077197 should be canceled. It also observed that, inasmuch as Cities Service filed a timely appeal from the rejection of its offer, it was improper to issue a lease to Mrs. Rubenstein prior to final disposition of the appeal.

Mrs. Rubenstein contends on appeal to the Secretary that regulation 43 CFR 192.43(b) did not shift the burden of preparing a proper metes and bounds description, as required under 43 CFR 200.5(a), from the applicant to the Bureau, that, in practice, 43 CFR 192.43(b) has not been construed as requiring the Bureau to post a metes and bounds description which would satisfy 43 CFR 200.5(a), and that, even if it could be interpreted as providing for such a mandatory requirement, the regulation must be considered ambiguous and it would be inequitable at this time to cancel her lease upon such interpretation. In support of her arguments Mrs. Rubenstein has cited numerous filing lists in which she asserts that lands posted as available for filing by the Bureau have been described in accordance with the descriptions in terminated leases, but not adequately to comply with 43 CFR 200.5(a). She asserts that in some of the cases, leases have been issued pursuant to lease offers containing the same descriptions as in the posted lists in disregard of the requirements of 43 CFR 200.5(a) and that in other cases the lease offerors have furnished the required metes and bounds descriptions after the Bureau failed to provide the necessary details in the posted lists.

The narrow issue presented by this appeal is whether the lands in sections 15 and 24 were not made available for leasing when they were posted because the tracts of land excluded from those sections were not described by metes and bounds. The Office of Appeals and Hearings held that they were not made available, thus not reaching the question whether the description in Cities Service's offer was adequate. Perhaps for this reason Cities Service did not appeal from the decision.

To resolve the issue presented, it is necessary to consider the respective requirements imposed by regulation upon the Bureau in describing lands to be posted and upon offerors in describing lands for which they are applying. As to the latter, the pertinent regulation provided at the time in question that—

*** [1] If the lands have been surveyed under the rectangular system of public land surveys, and the description can be conformed to such survey system, the lands must be described by legal subdivision, section, township, and range.

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[2] Where the description cannot be conformed to the public land survey, any boundaries which do not so conform must be described by metes and bounds, giving courses and distances between successive angle points with appropriate ties to established survey corners. [3] If not so surveyed and if within the area of the public land surveys the lands must be described by metes and bounds, giving courses and distances between the successive angle points on the boundary of the tract and connected with an official corner of those surveys by courses and distances. [4] If not so surveyed and the tract is not within the area of the public land survey, it must be described in a manner consistent with the description in the deed under which it was acquired, amplified where the deed description does not supply them, to include the courses and distances between the successive angle points on the boundary of the tract, and adequately shown on a plat or map to permit its location within the administrative unit or project of which it is a part. * * * 43 CFR 200.5(a), 24 F.R. 4141 (1959) (see substantially the same provisions in the current regulation, 43 CFR 3212.1(a) (i) and (ii)).

Under this regulation four methods of describing lands in offers are set forth. The first two apply when the lands sought are surveyed under the public land survey system and the latter two when the lands are not so surveyed.

The requirements for describing lands which are posted for leasing are set forth in a separate regulation which provided, at the time pertinent to this controversy, that:

* * * * *

On the third Monday of each month * * * the authorized officer of the Bureau of Land Management will post on the bulletin board in each land office a list by subdivision, section, township and range if surveyed or officially protracted, or, if unsurveyed, by the metes and bounds description of the lands in leases which expired, were cancelled, relinquished in whole or in part, or terminated and which will become subject to leasing * * *. 43 CFR 192.43(b), 24 F.R. 9846 (1959).²

It is at once apparent that the provisions for the description of land in the Bureau's postings were not identical with those for the descriptions to be furnished by lease offerors. Whereas the latter provided for four classes of lands (two categories of lands which have been surveyed under the public land survey system and two categories of lands which have not been surveyed), the former divided lands into only two classes, those which have been surveyed or officially protracted and those which are unsurveyed. If the lands are "surveyed," posting is required to be only by subdivision, section, township, and range. Only if the lands posted are "unsurveyed" is there any requirement for a metes and bounds description.

² The procedures for the leasing of previously leased lands have been subsequently so altered as to make the issue in controversy here essentially a moot question. See 43 CFR 3123.9(b).

In this case the exterior limits of both section 15 and section 24 have been surveyed. However, there has been no Government survey of any lot 11 or 12 in section 15 or of any lot 22 in section 24. In this situation, where a part of a survey section is to be made available for leasing but it cannot be described in terms of a legal subdivision or subdivisions, how is it to be described? As we have noted, 43 CFR 200.5(a) answered that question with specific instructions so far as lease offers are concerned, *i.e.*, the nonconforming boundary is to be described by metes and bounds.³ But the regulation on posting, 43 CFR 192.43(b), did not. Since the lands in question cannot be adequately described simply in terms of legal subdivisions, a question arises as to whether it is therefore impossible, under the regulation, to describe such lands.⁴

Although we must conclude that the regulation contained no specific instruction to the land offices as to how lands should be described for listing in the circumstances here, the basic intent and purpose of the regulation seem reasonably clear. The Bureau has never purported to provide, in its listing of lands which have become available for leasing, the complete and accurate descriptions of the lands which it has required of lease offerors as a condition to the issuance of leases, and it has never assumed the responsibility for providing for a lease offeror the correct description of lands which it declared to be available for leasing. See, *e.g.*, *Jack J. Spielberg*, A-29203 (March 18, 1963); *Charles D. Lee*, A-30535 (May 19, 1966). The cited decisions, as well as others, clearly bear witness to the fact that lease offerors have frequently been required to furnish greater detail in

³ Cities Service's offer clearly did not meet this requirement so was properly rejected.

⁴ It is not too difficult to ascertain wherein the root of the problem lies. The regulation prescribing the manner in which lands are to be described in lease offers for public lands provides that:

"If the lands have been surveyed under the public land rectangular system, each offer must describe the lands by legal subdivision, section, township, and range. If the lands have not been so surveyed, each offer must describe the lands by metes and bounds, giving courses and distances between the successive angle points on the boundary of the tract, in cardinal directions except where the boundaries of the lands are in irregular form, and connected by courses and distances to an official corner of the public land surveys. * * *

43 CFR 192.42a(a), now 43 CFR 3123.8(a).

[These requirements are consistent with the manner prescribed in 43 CFR 192.43(b) for the listing of available public lands. Because acquired lands cannot always be described in the terms provided for public lands, it was necessary to provide in a separate regulation (43 CFR 200.5(a)) for the various situations which might be confronted in attempting to describe acquired lands. However, the acquired lands leasing regulations contained no counterpart to 43 CFR 192.43. Thus, under the provision that the regulations under the general mineral leasing laws shall govern the disposition of minerals in acquired lands as well, unless otherwise provided (43 CFR 3211.3, formerly 43 CFR 200.4), the procedures outlined in 43 CFR 192.43 were applied to acquired lands as to public lands. But it is readily apparent that there are situations in which the Department has made no specific provision for the manner in which a land office is to describe lands which it determines to be available for leasing.]

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describing land than the Bureau has undertaken to provide for them, and the Department has sustained this requirement on the part of lease offerors even in the face of a specific finding that lands were not adequately described in a posted list of available lands. See *Charles J. Babington*, A-30449 (November 30, 1965). What then is the Bureau's responsibility, under the regulation in question, in describing lands which become available for leasing?

In light of the language used in the regulation and of the practical effect given to it by the Bureau during the period in which it was controlling, we believe that 43 CFR 192.43(b) can reasonably be construed only as setting forth in a general manner the procedure to be followed by the Bureau in giving notice to the public of lands which become available for oil and gas leasing. Surveyed lands were to be described by legal subdivisions and unsurveyed lands by the metes and bounds descriptions used in the expired leases in which they were included. But numerous situations arise, as we have already indicated, which do not fall into either category provided for in the regulation. Thus, in *Charles D. Lee, supra*, the Department held that lease offerors were required to describe by metes and bounds lands which had been surveyed under the public land survey system, conveyed to private parties, reacquired by the United States, platted by the acquiring agency and designated by tract numbers in conformity with the preceding pattern of private ownership, leased by the United States according to the tract numbers given by the acquiring agency, and, upon termination of the leases, posted by the Bureau for simultaneous filing and described by tract numbers. The Department did not question the propriety of the Bureau's listing, although it requires little argument to show that a description by tract number cannot be fitted into the categories of descriptions prescribed in 43 CFR 192.43(b), the regulation which was in effect there as well as here. We are unable, then, to find any evidence that the regulation has been construed, or to find a sound basis for concluding that it should be construed, as prescribing strictly the manner in which the Bureau must describe lands available for leasing, the failure to comply with which will render the lands not available.

The vital question, we think, is whether or not the Bureau, in listing lands, adequately *identifies* the lands which become available for leasing. If the lands are so described that a prospective offeror is able to ascertain what lands are available for leasing, the responsibility devolves upon the offeror to *describe* those lands in a manner consistent with the Department's requirements without regard to any short-

comings in the description furnished by the Bureau. If, on the other hand, the Bureau does not adequately identify the available lands, the problem will remain relatively simple. No description of the offered lands will be acceptable, for it will not be possible to establish with certainty whether or not an offeror describes the same lands which the Bureau has described.

The particular description used by the land office in this instance was not a model of clarity. On its face a description which reads "all of section 15 except lots 11 and 12" imports "all of section 15, as shown on the official plat of survey, except lots 11 and 12, as shown on the official plat of survey." It does not, without amplification, suggest "all of section 15, as shown on the official plat of survey, except lots 11 and 12, as shown on the plat of a private survey * * *." The lands in question might have been described as "all of sections 15 and 24 except * * * [areas described by metes and bounds]," or as "all of section 15 except lots 11 and 12, as defined by the survey of * * * and all of section 24 except lot 22, as defined by the survey * * *," or even as "all of sections 15 and 24 except those portions which are included in oil and gas lease * * *." Any of these descriptions would have been more adequate to put prospective offerors on notice as to the nature of the exceptions and the manner in which the lands must be described than was the description employed by the land office. Nevertheless, I am unable to conclude that the lands were not adequately identified by the land office.

It does not appear that any offeror was misled or was in doubt as to the actual areas of land which were declared by the land office to be available for leasing. In spite of the shortcomings of the description used by the land office, the failure of Cities Service to describe the lands properly would appear to have resulted from its own failure to understand exactly what description was required and not from any lack of understanding as to what lands were available for leasing. That at least one lease offeror furnished a correct description of the lands in question is evidence that those lands were adequately, although somewhat improperly, identified. In these circumstances I find no basis for concluding that the lands did not become available for leasing when posted by the land office. Accordingly, Mrs. Rubenstein's lease offer was properly found acceptable by the land office in the absence of any deficiencies shown to exist therein, and it was not necessary to list the lands as available in a subsequent drawing.

The Bureau correctly pointed out that it was error to issue a lease to Mrs. Rubenstein while the appeal of Cities Service remained pend-

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ing before the Department. However, in view of the conclusions reached here, no action need now be taken to cancel the Rubenstein's lease. See *Charles J. Babington*, A-30449, *supra*, in which the same situation arose.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a) ; 24 F.R. 1348), the decision appealed from is vacated insofar as it directed the cancellation of Mrs. Rubenstein's lease and the relisting of the lands by the land office.

EDWARD WEINBERG,
Deputy Solicitor.

**PROCUREMENT OF THE GOVERNMENT OF GUAM—APPLICABILITY
OF THE BUY AMERICAN ACT AND FEDERAL PROCUREMENT
REGULATIONS SYSTEM**

**Contracts: Construction and Operation: Buy American Act—Act of March 3,
1933**

All territories and possessions, including Guam, are considered locations of domestic sources of supply under the Buy American Act; but Guam is not limited to domestic sources in its purchases for use on Guam because under the rule of statutory construction *expressio unius est exclusio alterius*, it may be concluded that Congress intended to exclude Guam from the enumerated entities whose purchases for use or for construction within their boundaries would be limited to domestic sources.

**Federal Property and Administrative Services Act—Act of November 8,
1965—Guam: Generally**

Guam does not fall within the term "executive agency" as used in the Federal Property and Administrative Services Act and the implementing Federal Procurement Regulations.

Guam: Generally

The Buy American Act does not apply to purchases by the Government of Guam for use on Guam.

Suppliers on the Island of Guam are considered domestic sources of supply under the Buy American Act, and Guam is not an area "outside the United States" for the purpose of applying bid evaluation standards under the Balance of Payments Program.

M-36713

October 30, 1967

TO: DIRECTOR, OFFICE OF TERRITORIES.

SUBJECT: APPLICABILITY TO PROCUREMENT BY THE GOVERNMENT OF GUAM OF THE BUY AMERICAN ACT AND THE FEDERAL PROCUREMENT REGULATIONS REGARDING THE BALANCE OF PAYMENTS PROGRAM.

The Assistant Solicitor, Branch of Territories, by memorandum of June 23, 1967, has requested the Division of Water Resources and Procurement to review the problem of applicability of both the Buy American Act¹ and the Federal Procurement Regulations² regarding the Balance of Payments Program to procurement by the Government of Guam and to furnish definitive advice on the problem. In this connection the Assistant Solicitor, Branch of Territories has submitted for examination and review the files of the Office of Territories on the subject, including his memorandum to you of June 23, 1967. A study has been made of the problem, and, because of the importance thereof and the long-standing uncertainties relating thereto, the results of the study have been submitted to this office for clearance and direct referral to you for your future guidance.

BUY AMERICAN ACT

The Assistant Solicitor for Territories concluded in 1954 that the Buy American Act did not apply to purchases by the Government of the Trust Territories and Guam.³ The General Services Administration concurred,⁴ and this position has been followed by the Government of Guam since that time.

Section 10a of the Act⁵ provides, in part, as follows:

Notwithstanding any other provision of law * * * only such unmanufactured articles, materials, and supplies as have been *mined or produced in the United States*, and only such manufactured articles, materials, and supplies as have been manufactured in the United States * * * shall be acquired for *public use*. This section shall not apply with respect to articles, materials, or supplies for use outside of the United States * * * (italics added).

Section 10b of the Act⁶ makes the United States source requirement for mined, produced or manufactured articles applicable to articles,

¹ Act of March 3, 1933, 47 Stat. 1520, 41 U.S.C. §§ 10a-d (1964).

² FPR 1-6.800 *et seq.*

³ Memorandum from A. M. Edwards, Assistant Solicitor for Territories, Department of the Interior, to Charles W. Gasque, Jr., Assistant General Counsel, General Services Administration, dated June 2, 1954.

⁴ Letter from Charles W. Gasque, Jr., General Services Administration, to A. M. Edwards, Department of the Interior, dated June 9, 1954.

⁵ Sec. 2, Act of March 3, 1933, footnote 1, *supra*.

⁶ Sec. 3(a), Act of March 3, 1933, footnote 1, *supra*.

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materials and supplies used in construction, alteration or repair of public buildings or public works in the United States.

Section 10c of the Act,⁷ defines the terms "United States" and "public use," as used in sections 10a and 10b, as follows:

(a) The term "United States," when used in a geographical sense, includes the United States and any place subject to the jurisdiction thereof;

(b) The terms "public use," "public building," and "public work" shall mean use by, public building of, and public work of the United States, the District of Columbia, Hawaii, Alaska, Puerto Rico, the Philippine Islands,⁸ American Samoa, the Canal Zone, and the Virgin Islands.

At this point a brief reference to the history and political status of Guam is in order. The Island of Guam was ceded to the United States by the Treaty of Paris in 1898, following the Spanish-American War, and was placed under the administration of the Secretary of the Navy. Executive Order No. 10077, dated September 7, 1949, transferred the administration of the Island of Guam from the Secretary of the Navy to the Secretary of the Interior. This order was amended by Executive Order No. 10137, dated June 30, 1950, which established the date of transfer as August 1, 1950.⁹

Section 10c(b) as originally enacted¹⁰ defined the terms "public use" "public building" and "public work" to mean "use by, public building of, and public work of," "the United States, the District of Columbia, Hawaii, Alaska, Puerto Rico, the Philippine Islands, American Samoa, the Canal Zone, and the Virgin Islands." Guam, a possession of the United States and a territory in 1933, was thus excluded from the enumeration of territories and possessions to which the statutory definitions of "public use," etc., were made applicable. Hence, under the statutory rule of construction *expressio unius est exclusio alterius*, it may be concluded that Congress intended to exclude Guam from the enumerated entities whose purchases for use or for construction within their boundaries would be limited to domestic sources. This was the conclusion reached in both the June 2, 1954¹¹ and the June 23, 1967,¹² memorandums of the respective Assistant Solicitor for Territories.

⁷ Sec. 1, Act of March 3, 1933, as amended, footnote 1, *supra*.

⁸ The Philippine Islands have been deleted in view of the independence of that country. See Proclamation No. 2695, effective July 4, 1946, 11 F.R. 7517 (1946), 60 Stat. 1352 (1946).

⁹ 150 DM 4.1.

¹⁰ Sec. 1(b), Act of March 3, 1933, footnote 1, *supra*.

¹¹ Footnote 3, *supra*.

¹² Par. 1, p. 366, *supra*.

However, when we feature the words "United States" in a discussion of the act instead of the words "public use," "public building," and "public work," we could be led to a different conclusion. The definition of the "United States" furnished in subsection 10c(a) in a geographical sense "includes the United States and any place subject to the jurisdiction thereof."

The act fails to define the phrase "subject to the jurisdiction of [the United States]." We, therefore, turn elsewhere. In 1955, the Comptroller General had occasion to furnish a definition in answer to a letter from the Department of the Navy concerning the applicability of the Buy American Act to leased bases. In that opinion the Comptroller General made an analysis of what is now section 10c(a) :

* * * * *

As pointed out in the Memorandum forwarded by the Assistant Secretary [of the Navy], the sentence which sets forth the applicability of the act and the sentence which sets forth the nonapplicability of the act both use the word "United States" in a geographical sense and, therefore, both must be construed in the same manner. It thus follows that any area of the world construed to come within the meaning of the phrase "United States and any place subject to the jurisdiction thereof" would be entitled to all the protection or preference afforded by the act.¹³ * * *

In the case cited, the Comptroller General found that the United States had only limited jurisdiction over leased bases. As to them, he held that the phrase "the United States and any place subject to the jurisdiction thereof" could not mean any area "other than that over which the United States has complete sovereign jurisdiction in the fullest sense." Otherwise it "would result in increasing competition for American industry rather than affording it the protection clearly intended by the statute."¹⁴ In the context of being a "place subject to the jurisdiction of the [United States]" the United States has unadulterated sovereignty over the Island of Guam, albeit sovereignty is exercised by Congress as distinguished from the executive branch of the Government.¹⁵

The foregoing does not necessarily lead to a conclusion that the Buy American Act applies to purchases of the Government of Guam and public use, public building, or public work constructed there, as would seem to be the case at first impression.

It should be observed that, in the quoted and cited provisions of the act, the "United States" is spoken of in a geographical sense in three (3) places:

1. The location of acceptable sources of supply under the Act (of

¹³ 34 Comp. Gen. 448, 449 (March 16, 1955).

¹⁴ Comp. Gen., *supra* at 449.

¹⁵ See footnotes 27 through 30, *infra*.

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which Guam is one of them because it is "subject to the jurisdiction [of the United States]".¹⁶

2. The location of points of use to which, by inference, the act shall apply (in terms of their not being "outside the United States"¹⁷ in which sense Guam is not outside the United States).

3. The locations of public buildings and public works in the construction, alteration or repair of which the proscribed foreign materials are barred.¹⁸

With respect to the locations identified as points of use (2. above) and the locations of public buildings and public works (3. above), these fall clearly within the coverage of subsection 10c(b) where, as we have pointed out, there is an enumeration with "the United States" of specifically named territories and possessions which significantly excludes Guam. We are thus led to conclude that all territories and possessions, including Guam, are locations of acceptable sources of supply (1. above) under the act, but only the purchases of materials for use of or construction in territories and possessions named with the United States in subsection 10c(b) (which excludes Guam and other unnamed areas over which the United States exercises complete sovereignty) are limited to domestic sources under the act.

The foregoing construction is further supported by the long period of continuous practice which has been followed by the Government of Guam. Both the Office of Territories and the Government of Guam have long held that the act does not apply to purchases by the Government of Guam for use on Guam.¹⁹

Balance of Payments Program and the Federal Procurement Regulations

The President's Cabinet Committee on the Balance of Payments, supported by the President's memorandum of March 8, 1966, to the Heads of Executive Departments and Agencies, urged the agencies to minimize expenditures abroad in order to assist the Nation to achieve equilibrium in the balance of payments.

This program applies to all Federal agencies procuring for use abroad, except the Agency for International Development,²⁰ and is applicable to the procurement of articles, materials, supplies, and serv-

¹⁶ Footnote 5, *supra*.

¹⁷ *Ibid*.

¹⁸ Footnote 6, *supra*.

¹⁹ See *Word v. United States*, 223 Fed. Supp. 614, 617 (1963).

²⁰ FPR 1-6.801.

ices for use *outside* the United States²¹ (*Italics added*). As Guam is a territory subject to the jurisdiction of the United States, under the standards applied by the Comptroller General in interpreting the Buy American Act, the Island, in a geographical sense, is not "outside of the United States," and purchases made by the Government of Guam, for use on the Island of Guam, are not purchases for use outside the United States. Therefore, indigenous sources of supply on Guam would not be required to compete with domestic sources elsewhere in connection with purchases of the Government of Guam by addition of a 50 percent differential to their bids as contemplated by FPR 1-6.801.

Quite aside from exclusion of Guam from the category of areas "outside the United States," we are persuaded that it could not have been intended by the framers of the Balance of Payment policy that materials from suppliers on Guam be evaluated as foreign materials.

At first glance the above reasoning may appear to dispose of the application of the Balance of Payments Program to Guam. However, the inquiry here concerned raises a more basic question—whether Guam is an Executive Agency as defined in section 3 of the Federal Property and Administrative Services Act of 1949,²² as amended, and the implementing Federal Procurement Regulations issued by the General Services Administration, pursuant to the act. Thus, we face a more serious inquiry as to the applicability not only of the Federal Procurement Regulations incident to the Balance of Payments Program,²³ but also the broad problem of applicability of the entire Federal Procurement Regulations System.

By the act of November 8, 1965, the Federal Property and Administrative Services Act was made applicable on a mandatory basis to "Executive Agencies."²⁴ Section 3 defines the relevant terms as used in Titles I through III of the Act, as follows:

(a) The term "executive agency" means any executive department or independent establishment in the executive branch of the Government, including any wholly owned Government corporation.

(b) The term "Federal agency" means any executive agency or any establishment in the legislative or judicial branch of the Government (except the Senate, the House of Representatives, and the Architect of the Capitol and any activities under his direction).

Guam is an organized unincorporated territory of the United States.²⁵ The executive power of the Territorial Government is exercised by the Governor of Guam with the unicameral legislature and the

²¹ FPR 1-6.800.

²² 40 U.S.C. sec. 472(a) (1964).

²³ Footnote 2, *supra*.

²⁴ 79 Stat. 1303, 41 U.S.C. sec. 252 (Supp. I, 1964).

²⁵ Guam Organic Act, 64 Stat. 389, 48 U.S.C. sec. 1421a (1950), 150 DM 4.1.

APPLICABILITY OF THE BUY AMERICAN ACT AND FEDERAL
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judicial power is vested in local courts and the "District Court of Guam." The seat of this government is Agaña.²⁶

Until Congress legislates to incorporate Guam into the United States, the Island will be governed under the power existing in Congress as contained in Article 4, section 3, of the Constitution.²⁷ Territories of the United States are inchoate states with temporary sovereign governments organized under Congressional laws and limited only by their Organic Acts and the United States Constitution.²⁸

Guam is not an instrumentality or agency of the executive branch of the Federal Government,²⁹ and pursuant to section 3 of the Guam Organic Act, and by the President's letter dated January 23, 1951, the Secretary of the Interior has been entrusted with the responsibility for only the general administrative supervision of the relations of the Guam Government with the Federal Government.³⁰

The Division of Territories has reviewed the question of whether the Government of Alaska (prior to gaining Statehood), was to be regarded and treated as an independent entity outside the Executive establishment.³¹ So also has the General Accounting Office with respect to American Samoa³² and the U.S. District Court for the Virgin Islands, with respect to the the Virgin Islands.³³ In each instance, it was concluded that the areas concerned were legal entities, separate and distinct from the executive agencies of the United States. In the light of these opinions, we feel justified in arriving at a similar interpretation with respect to the status of Guam.

In view of the foregoing, we must conclude that Guam does not fall within the term "executive agencies" as that term is used in the Federal Property and Administrative Services Act of 1949, and, therefore, its procurement contracting does not come within the coverage of the Federal Procurement Regulations System.

EDWARD WEINBERG,
Acting Solicitor.

²⁶ 150 DM 4.2.

²⁷ 49 Am. Jur. States, Territories and Dependencies, § 118 (1963).

²⁸ *Harris v. Municipality of St. Thomas and St. John*, 111 F. Supp. 63 (D.C.V.I. 1953).

²⁹ 150 DM 1.3(4).

³⁰ 150 DM 4.3.

³¹ Solicitor's Memorandum Opinion, M-36222 (September 29, 1955).

³² Comp. Gen. (unreported), B-160139 (December 22, 1966).

³³ Footnote 28, *supra*.

ROBERT P. KUNKEL

A-30792

Decided November 7, 1967

Oil and Gas Leases: Applications: Description—Words and Phrases

"Legal Subdivision"—It is not proper to reject an oil and gas lease offer which describes land in one section as the NW $\frac{1}{4}$ and land in another section as the N $\frac{1}{2}$, where each section is irregular and the NW $\frac{1}{4}$ of one has been subdivided wholly into lots and the N $\frac{1}{2}$ of the other has been partially subdivided into lots, on the ground that the offer failed to describe the land by "legal subdivision" in accordance with the latest plat of survey, where that term has been used to include fractional as well as regular subdivisions.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Robert P. Kunkel has appealed to the Secretary of the Interior from a decision dated February 27, 1967, by the Chief, Office of Appeals and Hearings, Bureau of Land Management, affirming a Utah land office decision of August 30, 1966, which rejected his oil and gas lease offer Utah 0148310 as to certain lands included in oil and gas lease Utah 0148287, and as to certain other lands in sec. 19 and sec. 31, T. 3 N., R. 21 E., S.L.M., on the ground that the descriptions are not conformable to the latest approved plats of survey of the township. The offer was accepted for other lands and a lease issued effective September 1, 1966.¹

The appellant's appeals to the Director, Bureau of Land Management, and to the Secretary question only the propriety of the rejection of his offer based on the question of the adequacy of the land description. His offer described the land requested in the two sections with which we are concerned as follows:

Sec. 19: N/2, N/2 SE/4

Sec. 31: NW/4, N/2 NE/4

The land office rejected the offer as to the NE $\frac{1}{4}$ and E $\frac{1}{2}$ NW $\frac{1}{4}$ of sec. 19 and lot 1 of sec. 31 on the ground that the lands were included in oil and gas lease Utah 0148287. The land office also stated that the offer was rejected as to the W $\frac{1}{2}$ NW $\frac{1}{4}$ sec. 19 and the NW $\frac{1}{4}$ sec. 31 for the reason that the survey plat shows that the land in the approximate locations in sections 19 and 31, as described above and in his offer, are properly described as lots 1 and 2, sec. 19, and lots 2, 3, 4, and 5, sec. 31.

¹For the record it is noted that the decision of the Chief, Office of Appeals and Hearings, also took initial action in canceling conflicting lease Utah 0148287 of Vennes Jones as to lot 1 section 31 of the above township and range, on the ground that the offer had a defective description of the land and did not, in fact, include portions of the lot within the offer description. Jones has not appealed from this decision; therefore, it has become final as to lease Utah 0148287. No further discussion of this aspect of the Bureau's decision is necessary.

It pointed out that under regulation 43 CFR 3123.8 surveyed lands must be described "by legal subdivision, section, township and range," and that the Department has held that the lands must be described in accordance with the latest approved plat of survey, citing *Doris L. Ervin et al.*, 66 I.D. 393 (1959), and *J. Harry Henderson*, A-28583 (February 10, 1961). In affirming this action, the Office of Appeals and Hearings also cited *L. S. Key*, A-24369 (August 5, 1946), as expressly holding that offers for oil and gas leases for surveyed public lands must describe the land by legal subdivisions or fractional lots in conformity with the official system of public land surveys.

Appellant contends his description is proper to identify the lands. He states that in the past numerous offers with legal subdivision descriptions in place of the lot numbers assigned by an approved plat of survey were allowed to be issued without question, citing several Utah and Nevada serial numbers. He contends that the Bureau's interpretation of the regulation is not consistent with many past actions of the Bureau "despite several Bureau of Land Management decisions to the contrary." He contends that a uniform procedure concerning this type of application was not being followed up to the time his offer was filed and that therefore it should be accepted.

The general discussion by the Bureau concerning the necessity of describing the land in accordance with the latest plat of survey and the citations of Departmental decisions to this effect are correct. However, this is not the issue. The issue is whether the descriptions in appellant's offer were descriptions of land by "legal subdivision" within the meaning of regulation 43 CFR 3123.8. Specifically, the question is whether the description "Sec. 19: N/2" is not a description by legal subdivision because the plat of survey shows the north half of section 19 as comprising a regular NE $\frac{1}{4}$ containing 160 acres, a regular E $\frac{1}{2}$ NW $\frac{1}{4}$ containing 80 acres, but, instead of a regular W $\frac{1}{2}$ NW $\frac{1}{4}$ containing 80 acres, two lots, 1 and 2, containing 37.15 and 37.13 acres, respectively. The question is also whether the description "Sec. 31: NW $\frac{1}{4}$ " is not one by legal subdivision because the plat of survey shows that, although, sec. 31 is divided into four quarters by intersecting east-west and north-south lines, which produce a regular SE $\frac{1}{4}$ containing 160 acres, the northwest quarter of the section is subdivided into four lots, 2, 3, 4, and 5, of varying acreage (37.78, 45.75, 30.47, and 40 acres, respectively) and irregular placement.

The meaning of the term "legal subdivision" must be adduced from the public land laws pertaining to official public land surveys (see 43 U.S.C. secs. 751-753 (1964)). As stated in *Greenblum v. Gregory*, 294 Pac. 971, 972 (Wash. 1930), with reference to the term:

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"It applies only to the divisions of land which result from the application of the ordinary methods used in the making of a government survey; the smallest of these being the 40-acre square, or quarter-quarter section, except where by reason of special conditions lots of more or less irregular shape are laid out, as in the case of fractional sections." *Hooper v. Nation*, 78 Kan. 200, 96 Pac. 77, 78 (1908).

The *Glossary of Public Land Terms*, published by the Department of the Interior (1959 reprint), under the term "legal subdivision" states:

In a general sense, a subdivision of a township, such as a section, quarter section, lot, etc., which is authorized under the public-land laws; in a strict sense, a regular subdivision.

Under the public land survey laws a regular section has 640 acres, a half-section 320 acres, a quarter section 160 acres, a half-quarter section 80 acres, and a quarter-quarter section 40 acres. The laws prescribe the manner of running the boundaries of these subdivisions within the section. There is also provision for allocating deficiencies or excesses in townships and sections with the loss or excess being placed upon the western and northern sections in a township and also upon the western and northern subdivisions within a section. Where a reservation or watercourse is encountered there is provision for fractional sections and townships. The practice of this Department for many years has been to designate the parts of a fractional or oversized section which do not conform to the acreage and placement of subdivisions in a regular section by lot numbers. See *Manual of Surveying Instructions*, BLM, Department of the Interior, §§ 161, 196, and 581 (1947).

In the "strict sense" as suggested by the Department's *Glossary of Public Land Terms*, *supra*, the term "legal subdivision" would refer to a "regular subdivision," thus reference to the N $\frac{1}{2}$ of a section would connote a regular 320-acre subdivision, and reference to the NW $\frac{1}{4}$ of a section would connote a regular 160-acre subdivision. However, as the glossary recognizes, in a "general sense" the term "legal subdivision" includes any subdivision of a township, including a "lot," which is authorized under the public land laws. In what sense, strict or general, is the term used in the regulation?

We think it is clear that it was used in a general sense, that this is the only reasonable and logical interpretation that can be given to the regulation. This can be demonstrated as follows: There is no question but that appellant's offer would have been accepted if it had described "lots 1 and 2" in section 19 and "lots 2, 3, 4, and 5" in section 31. That is the way the Bureau said the lands should have been described. This means then that the term "legal subdivision" is used in the general sense in the regulation because it includes a lot and not merely a

regular subdivision. Now the regulation does not use the term "smallest legal subdivision" so as to require a tract applied for to be described by quarter-quarter sections even though a regular quarter section, half section, or even full section is applied for. Thus, "NE $\frac{1}{4}$ " can be used instead of "NE $\frac{1}{4}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$ NE $\frac{1}{4}$, SE $\frac{1}{4}$ NE $\frac{1}{4}$, and SW $\frac{1}{4}$ NE $\frac{1}{4}$ " and, therefore, is a "legal subdivision" within the meaning of the regulation. In other words, a "legal subdivision" can embrace a collection of smaller legal subdivisions. If this is the case, why cannot a group of lots, which are legal subdivisions, be designated as a larger unit, such as "NE $\frac{1}{4}$ "? What would be the logical basis for holding that such larger designation is not a "legal subdivision" when the component elements are legal subdivisions? We can think of none.

Of course, the larger unit must be a "legal subdivision," a unit which is provided for by the public land surveys, such as a half-quarter section, quarter section, half section, etc. Thus, only two contiguous quarter-quarter sections located in the same quarter section can be designated as a half-quarter section, such as "N $\frac{1}{2}$ NE $\frac{1}{4}$," "E $\frac{1}{2}$ NE $\frac{1}{4}$," etc. But two contiguous quarter-quarter sections located in different quarter sections cannot be so designated. They must be separately described, such as "SE $\frac{1}{4}$ NE $\frac{1}{4}$ " and "NE $\frac{1}{4}$ SE $\frac{1}{4}$." Also, two cornering quarter-quarter sections located in the same quarter section must be separately described, e.g., "NE $\frac{1}{4}$ NE $\frac{1}{4}$ " and "SW $\frac{1}{4}$ NE $\frac{1}{4}$."

This is also true with respect to lots. As we have noted, the four lots into which the NW $\frac{1}{4}$ sec. 31 is divided are irregular in size and placement. No two or three of these lots can be described under a single designation since there is no intermediate designation between lot and quarter section into which any two or three of the lots can be placed. On the other hand, the NW $\frac{1}{4}$ sec. 19 is divided into an east half, a regular 80 acres, and a west half, comprising lots 1 and 2. It would be proper to describe lots 1 and 2 as the "W $\frac{1}{2}$ NW $\frac{1}{4}$ " sec. 19.

The position taken in the decisions below that "legal subdivision" in the regulation means only combinations of perfectly regular subdivisions is not required by the language of the regulation or by any other authority that we know. It is inconsistent with the admission that in its smallest application the term includes lots, which are practically always irregular in shape and size. It is also inconsistent with the fact that entire sections can be applied for simply by section number although the section is fractional in size.

For example, if, as to either sec. 19 or sec. 31, appellant had applied for all of the lands in the section, simply by referring to the section number and saying "all of the section," this description would be acceptable since a section is clearly a legal subdivision under the public land survey laws even though it is fractional or irregular. If any of

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the lands in the section were unavailable for lease, the land office should reject the offer as to such lands and issue a lease describing those lands in the section which are available by their aliquot parts. The fact, by itself, that a portion of the lands are not available for leasing does not render the offer unacceptable as to those lands which are available so long as the description of all the lands was proper. Cf. *Charles J. Babington*, 71 I.D. 110 (1964); *William B. Collister*, 71 I.D. 124 (1964).

While there may be situations in which a description in terms of half or quarter sections pertaining to lands which are not regular may be confusing or inadequate, this is not one. The statutes governing the survey of the public lands (43 U.S.C. secs. 751, 752 (1964)) and the *Manual of Surveying Instructions* (*supra*) set out the method for establishing half sections and quarter sections and clearly contemplate that some quarter and half sections will have more or less than the regular amount. Thus, so long as the lines dividing a section into quarter or half sections are shown upon the plat all land falling within the half or quadrant may be referred to in terms of the quarter or half section, even though its internal subdivision is set out as one or more lots.

We see no necessity for an offeror to describe all of the fractional and regular subdivisions within a section, half section, or quarter section when he applies for all of the lands therein. The acreage may be computed by reference to the survey plat which shows the acreage returned for each subdivision, or, if not, the subdivision is presumed to be regular. So where appellant described the land in section 19 desired as the N $\frac{1}{2}$, it is apparent that reference can again be made to the survey plat to ascertain the acreage and the limits of the description. Although there are two lots it is apparent that they were placed within the area which is regularly the N $\frac{1}{2}$ and there is no doubt as to what land was intended.

Appellant's primary contention is that the Bureau and Departmental practice in requiring a description to include the lot numbers in a situation such as involved with his offer has not been consistent and that therefore he should not be penalized. We believe that this contention is true. Leases under the Mineral Leasing Act and patents under the public land laws have frequently been issued under descriptions by regular subdivisions, such as NE $\frac{1}{4}$, where that subdivision in whole or in part was allocated into lots. Difficulties under the public land laws of determining what lands may be included under designations of technical or fractional quarter sections under the public land laws have been pointed out in *Instructions*, 37 L.D. 330 (1908).

Under the law and regulations pertaining to oil and gas leasing, the description is necessary, of course, to determine the land desired and also as a means of determining the acreage. However, if the land desired can be determined by reference to the plat of survey and the acreage determined from that plat, and if there is adequate rental submitted to cover the acreage, these fundamentals are satisfied.

In brief, we conclude that a reference to a quarter or half section, etc., such as N $\frac{1}{2}$ or NW $\frac{1}{4}$, is a description by legal subdivision, whether or not the area is regularly divided internally, as long as it is marked off on the plat of survey from the other parts of the section in a regular manner. If a more precise and accurate description is desired where other than regular subdivisions are involved, the regulation should be amended to spell out the requirement.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a); 24 F.R. 1348), the decision is reversed and the case is remanded for further action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

HENRY P. AND LEODA M. SMITH

A-30818

Decided November 9, 1967

Mining Occupancy Act: Principal Place of Residence

The act of October 23, 1962, requires that an applicant or his predecessors must have occupied valuable improvements on the claim as a principal place of residence for the 7-year period immediately preceding July 23, 1962, and where there is a break of several years in that period the requirement is not satisfied even though a predecessor of the applicant may have occupied the claim as a principal place of residence for more than 7 years including time prior to July 23, 1955.

Mining Occupancy Act: Principal Place of Residence

Where the purchaser of a claim visits a cabin on the claim on an intermittent basis primarily for the purpose of repairing the cabin and readying it for occupancy, while he maintains a regular residence elsewhere, the cabin does not constitute "a principal place of residence" within the meaning of section 2 of the act of October 23, 1962, and an application for the conveyance of land based upon such use is properly rejected.

Mining Occupancy Act: Qualified Applicant

A qualified applicant for the conveyance of land under the act of October 23, 1962, must have satisfied the requirements of the act as of that date and neither his intent to making a mining claim site a principal place of residence at a future date nor the carrying out of such intent after October 23,

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1962, can serve to qualify an applicant whose use of the site prior to the critical date did not satisfy the requirements of the act as to occupancy of the site as a principal place of residence.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Henry P. and Leoda M. Smith have appealed to the Secretary of the Interior from a decision dated April 18, 1967, whereby the Office of Appeals and Hearings, Bureau of Land Management, affirmed a decision of the Colorado land office rejecting their application Colorado 0123332, filed pursuant to the act of October 23, 1962, 30 U.S.C. secs. 701-709 (1964), to purchase a tract of land in the M.C. lode mining claim in sec. 25, T. 1 N., R. 73 W., 6th P.M., Colorado.

The appellants filed their application on January 26, 1966,¹ stating therein that the M.C. mining claim was first located by W. H. Crane and Norris G. Mitts on August 24, 1940, and that an amended location was made by the same parties on November 13, 1946, that J. E. and Eugenia B. Spaulding and Irene Boone Crane conveyed the property to G. R. Surrant and B. (Bernard) Smyth by quitclaim deed on July 30, 1958, and that Surrant and Smyth conveyed it to the appellants by quitclaim deed on August 4, 1961. They asserted in the application that a cinderblock dwelling was constructed on the claim by W. R. Crane about June 1942, that the building has been maintained as a principal dwelling by the appellants since they purchased the property on August 4, 1961, and has been used by others as a dwelling since at least July 23, 1955, that W. R. Crane, who constructed the building, lived there until his death and that his widow continued to live there until July 1958 when the property was conveyed to Surrant and Smyth.²

By a decision dated November 7, 1966, the land office rejected appellants' application, relying upon the report of an investigation conducted by the Forest Service and the conclusion set forth therein that the use of the cabin situated on the claim had been infrequent and intermittent and that the cabin had not been occupied by appellants as a principal place of residence as defined in the act of October 23, 1962. The Forest Service report, the land office noted, asserted that the nature of the improvements and their suitability for permanent occu-

¹ The application was filed after the appellants had filed on August 4, 1964, a petition for a statement of belief as to the validity of the claim and had been notified on December 6, 1965, by the land office that the Forest Service considered the claim to be invalid. On January 3, 1966, appellants filed a relinquishment of the claim.

² A report from the Forest Service contained in the record deviates in some minor points from the information given by appellants with respect to dates and spelling of names (e.g., G. R. *Surratt* rather than G. R. *Surrant*). It also indicates that there were additional conveyances not shown by appellants' application between the date of location of the claim and the date of conveyance to the appellants. Resolution of these differences is not, however, essential to the disposition of the issues before us in this appeal.

pancy were not consistent with use as a principal place of residence, that the Smiths' purchased their present substantial home in Boulder, Colorado, in 1955 and that, during the period from July 23, 1961, when appellants first visited the cabin site, to October 23, 1962, appellants were present at the cabin on a total of 68 different days and spent only 16 nights there.³

On appeal to the Director, Bureau of Land Management, the appellants acknowledged that they own a home in Boulder but denied that such ownership disqualified them as residential occupants under the Mining Occupancy Act. They contended that the claim site dwelling is of substantial construction, that W. R. Crane lived there from 1942 until his death, that his wife continued to live there until 1958, and that her statement that she lived there during that period is more convincing than the observation of a forest ranger that the structure was not suitable for permanent residence. They asserted that during 1961 they spent considerable time and effort in remodeling and improving the dwelling, that during the spring and summer of 1962, and subsequent thereto, they were at their mountain home "during frequent intervals," and that the data which they furnished to the Forest Service, and which were relied upon by the Forest Service as the basis for determining the extent of their use and occupancy, were never intended as a diary but constituted a mere recollection of events and did not reflect all of the dates of occupancy. In support of their allegations appellants submitted a statement of Mrs. Irene Crane attesting to the fact that she lived on the claim until July 1958, a statement of LaVerne M. Keller that he performed carpentry and repair work on the Smiths' house and, on several occasions, sent the bill by general delivery mail to the Nederland post office and that Smith had his mail sent there when the appellants first bought the property in 1961, and a statement of Joseph M. Smith, Nederland, Colorado, that "Mr. Henry P. Smith occupied the concrete block house on the old Crane property near Glacier Lake during the winter of 1961 and 1962." They also submitted a copy of the list of periods of occupancy previously furnished to the Forest Service.

In affirming the rejection of appellants' application the Bureau found that the record appeared to be clear in showing that Mrs. Crane's residence terminated in July 1958, that Surratt and Smyth did not establish any residence during the term of their ownership, that appellants did not start using the claim for any form of occupancy until the spring of 1962, and that, from that time until October 23, 1962, they

³ The computation of the number of days and nights spent at the cabin by appellants was made from a list, in diary form, furnished to the Forest Service by appellants which showed visits to the claim site from July 1961 (prior to appellants' acquisition of the property) until January 1965.

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spent a total of 43 days and 12 nights at the claim. This sort of occupancy, the Bureau held, did not demonstrate that the cabin was used as a principal place of residence on the terminal date. The Bureau concluded that nothing in the statements submitted by the appellants controverted the decisive information developed by the Forest Service and that, consequently, the evidence developed by the Forest Service would be accepted rather than the statements submitted by the appellants, citing *Wilford S. Jones*, A-29320 (May 2, 1963).

In their present appeal the Smiths have reiterated the essence of their contentions before the Director, Bureau of Land Management. They also contend, *inter alia*, that, contrary to the Bureau's finding that the cabin was given only casual or intermittent residential use, they "have occupied this home on many occasions without special regard to holidays, vacations or seasons of the year, nor was there any allegation that the Smiths used this home only for a week-end retreat; vacations, or as a hunting cabin." They assert that Mr. Smith, in fact, conducted business from his mountain home and that the 16-year residence of the Cranes, during which time the cabin was their only residence, is, without more, sufficient to overturn the Bureau's erroneous conclusions. They again insist that the cabin is a suitable place of residence and, in support of this allegation, they have submitted recent photographs of the exterior and interior of the dwelling which, they contend, show the misrepresentation of the Forest Service with respect to the quality of the improvements. In addition to copies of statements previously furnished, appellants have submitted the statement of Doyle N. Decker, manager of the Nederland Super Market, that "Mr. Henry Smith has been doing business with me since I assumed managership of the Nederland Super Market in June of 1961" and the statement of Lew Ward, sales manager of The Doran Coffee Roasting Company, Inc., Denver, Colorado, dated January 2, 1962, to the effect that:

You can work all this route from your cabin each week. All this year you can be there and on Friday each week work Boulder and pick up your stock on Mondays here at the Denver plant. The same way you did in 1961.

In asserting that the residential use made of the mining claim by the Cranes prior to July 1958 is, alone, sufficient to overturn the decision of the Bureau, appellants reveal a misunderstanding of the requirements of the statute. Section 2 of the act of October 23, 1962, 30 U.S.C. sec. 702 (1964), defines a qualified applicant under the act as

* * * a residential occupant-owner, as of * * * [October 23, 1962], of valuable improvements in an unpatented mining claim which constitute for him a principal place of residence and which he and his predecessors in interest were in possession of for not less than seven years prior to July 23, 1962.

This provision establishes two requirements: (1) that the applicant own and occupy valuable improvements on the claim as a principal place of residence as of October 23, 1962, and (2) that he and his predecessors so occupied such improvements "for not less than seven years prior to July 23, 1962." Appellants read the last quoted phrase as permitting any 7-year period of occupancy to be counted so long as it occurred at some time prior to July 23, 1962, and not only *immediately preceding* July 23, 1962.

This interpretation is not correct. The statute requires the 7-year period of occupancy to be that immediately preceding July 23, 1962, in other words, the 7-year period beginning on July 23, 1955. This is made clear by the legislative history of the statute. In explaining the use of the term "qualified applicant" in the act, the Senate Committee on Interior and Insular Affairs stated:

Section 2 defines a qualified applicant. * * * He must be a residential occupant-owner as of July 23, 1962.⁴ This does not mean in actual physical residence on that date but rather that the residence must have been habitable and, as is explained below, used during the *preceding* 7 years in a manner consistent with the purposes intended to be covered by the act.

* * * * *

The applicant and his predecessors in interest must have been in possession of the claim for not less than 7 years prior to July 23, 1962—that is, since July 22, 1955. S. Rep. No. 984, 87th Cong., 2d Sess. 5, 6 (1962) (Italics added).

More recently, in recommending extension of the life of the act, the same committee stated:

* * * In order to be qualified an applicant must have been the owner of valuable improvements on the mining claim on October 23, 1962, and the improvements must have been a principal place of residence for him and his predecessors in interest for not less than 7 years before July 23, 1962. * * * S. Rep. No. 593, 90th Cong., 1st Sess. 2 (1967); see remarks of Senator Church, 113 Cong., Rec. S14705 (daily ed. October 12, 1967), and remarks of Congressman Saylor, 113 Cong. Rec. H13391 (daily ed. October 16, 1967).

Thus, the fact that the Cranes may have occupied the cabin on the claim as a principal place of residence for more than 7 years prior to July 1958 does not satisfy the statute. It must be shown that the cabin continued to be occupied as a principal place of residence through July 23, 1962.

The appellants do not allege, and there is nothing in the record to suggest, that the mining claim site was occupied for any purpose by Surratt or Smyth from the time they acquired the claim in July 1958 until the appellants purchased it in 1961. The only information in the record relating to use of the claim by Surratt and Smyth, in fact, is in derogation of such supposition.

⁴ The determinative date was subsequently changed to October 23, 1962.

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By separate letters dated March 18, 1966, the Forest Service inquired of Surratt and Smyth as to the extent of their use of the dwelling on the M.C. lode mining claim during the period when they held title. Surratt replied in a letter dated March 24, 1966, that:

We'd planned on going up week-ends and doing some mining. Also was going to try and get a patent. We found we didn't have time on week-ends, so gave it up.

In a letter dated March 31, 1966, Smyth stated:

* * * Mr. Surratt and I purchased the claim with the idea of working it in our spare time, and to try and get a patent on it. But finding it took a lot of time and work, and not being able to afford any equipment larger than [sic] a pick and shovel. We did keep up the assessment work on it each year, but not much more, so in not finding anything worthwhile we decided to give it up.

Thus, it appears that neither Surratt nor Smyth resided in the claim site cabin at any time during the entire three-year period that they held the claim.

It does not appear, moreover, that appellants' occupancy of the cabin satisfied the requirements of the statute, at least with respect to the portion of the 7-year period extending from August 1961 to July 23, 1962. There seems to be little doubt, from the appellants' own assertions, that at least until the spring of 1962 they had not occupied the cabin as a principal place of residence. The most that they were doing during that time was to repair and improve the cabin so that it could serve as an adequate residence. Although they assert that their "diary" was not intended as such but constituted a mere recollection of events and did not reflect all the dates of occupancy, it is revealing as to the nature of their occupancy. Thus, the entries show the following:

July 20, 1961--	cabin was bought "sight unseen."
July 23-----	cabin was "a dirty mess," kitchen had no floor.
July 27-----	floor put down.
Aug. 14-----	water from spring tested, "no good."
Sept. 5-----	plastering of living room commenced.
Oct. 7-----	windows worked on.
Oct. 21-----	front door fixed.
Nov. 16, 28---	west wall fixed, snow came in.
May 9, 1962---	part of kitchen plastered.
July 30-----	windows painted.

Other entries during that period indicate that although the appellants or one of them may have been on the claim on 48 different days during the one-year period covered, most of the time was spent on such activities as repairing the cabin, digging around and moving

rocks, working on the claim, etc. During the period appellants stayed on the claim only 3 or possibly 6 nights. Quite obviously, during this period of almost one year appellants were going to the claim at roughly weekly intervals only to make the cabin a livable place.

In attempting to distinguish between their use of the cabin site and the intermittent use which the Department has held to be nonqualifying in prior cases, appellants contend that their use of the claim site was not limited to any of the purposes specified in the Department's regulations as nonqualifying,⁵ i.e., as a weekend cabin, a hunting cabin or a two-week vacation place, but that they occupied the home on many occasions without special regard to holidays, vacations or seasons of the year. A similar contention was rejected by the Department in *H. T. Crandell*, 72 I.D. 431 (1965), and there appears to be no more validity in the argument as it is raised here.

The regulation does not purport to list all of the nonqualifying purposes for which a mining claim site may be used. The specific uses excluded from consideration by the regulation are merely illustrative of the types of use which do not establish a structure as a principal place of residence. The substance of the provision is that intermittent or sporadic use or occupancy for any purpose while concurrent residence is maintained at a regular place of residence or domicile, as distinguished from occupancy for at least a substantial part of each year to the exclusion of maintenance of regular residence elsewhere during the same period, is not qualifying under the act. See *Cora Pruett et al.*, A-30524 (April 28, 1966); *Herman C. and Edith O. Kampling*, A-30592 (September 26, 1966); *Jack T. and Gladys I. Lofstrom*, A-30699 (March 23, 1967).

The supporting statements furnished by appellants do not modify the impression conveyed by the appellant's own declaration. Statements that bills for work done on the cabin were sent to the appellants at the Nederland post office and that appellants did business at the Nederland Super Market do not prove any particular periods of occupancy or the nature of the occupancy. It is noted that the record shows that on September 1, 1966, the district ranger requested Joseph M. Smith to clarify his statement with respect to appellants' occupancy of the mining claim, stating that since "the word 'occupied' can mean one day or the entire winter period, I would appreciate a statement from you as to what you meant by the word 'occupied.'" The record does not show that a reply was received. Nor do we find in Mr. Smith's

⁵ The Department's regulations define a principal place of residence as "an improved site used by a qualified applicant as one of his principal places of residence except during periods when weather and topography may make it impracticable for use. The term does not mean a site given casual or intermittent residential use, such as for a hunting cabin or for weekend occupancy." 43 CFR 2215.0-5(d); see S. Rep. No. 1984, 87th Cong., 2d Sess. 5-6 (1962); H.R. Rep. No. 2545, 87th Cong., 2d Sess. 4 (1962).

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obtaining permission to work his sales route from his cabin evidence that he did, in fact, reside in the cabin for any substantial period of time prior to July 23, 1962, or even October 23, 1962.⁶

Appellants' application, therefore, is fatally defective in that they have not shown that one of the basic requirements of the statute has been met, namely, that they or their predecessors occupied valuable improvements on the claim as a principal place of residence for the 7-year period running from July 23, 1955 to July 23, 1962. There was a clear period of 3 years, from July 1958 to July 1961, when there was apparently no occupancy in any sense by their immediate predecessors, Surratt and Smyth. And, as we have just noted, appellants' own occupancy for the last year of the 7-year period does not qualify.

This makes it unnecessary to consider whether the second requirement of the statute has been met, namely, that the appellants were occupants of the cabin on the claim as a principal place of residence as of October 23, 1962. The frequency and quality of their occupancy do not appear to have changed from July 23, 1962 to October 23, 1962, but we need not consider the matter further.

It is, of course, not necessary for us to determine whether or not appellants' use of the cabin after October 23, 1962, was of such a nature as to be termed "residential occupancy," for such use could in no event establish any rights under the act if appellants did not meet the requirements as of the date of the act. Qualification for relief under the act is dependent solely upon facts which existed on and prior to October 23, 1962, and neither the intent to make a mining claim site a principal place of residence at a future date nor the actual carrying out of such intent after that date can serve to qualify an applicant who did not satisfy the criteria of the act on the critical date. *H. T. Crandell, supra*; *Joseph W. Hinton et al.*, A-30374 (November 17, 1965). Upon the basis of the evidence submitted by the appellants we must concur in the Bureau's finding that appellants have not shown themselves to be qualified applicants for relief under the act. In view of the basis for this conclusion, it is unnecessary to determine the merits of appellants' allegations of error on the part of the Forest Service in its findings with respect to the suitability of the cabin for residential use and its observations with respect to the number of occasions on which the cabin was used.

⁶ We note that the first reference to any use of the cabin in connection with Smith's employment is in an entry of October 2, 1963, that "Henry is working stops up here—Selling coffee." Even at that date, however, there is no clear indication as to what the actual periods of occupancy were.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the decision appealed from is affirmed, as modified.

ERNEST F. HOM,
Assistant Solicitor.

GRACE KINSELA

A-30863

Decided November 16, 1967

Mining Claims: Withdrawn Land—Withdrawals and Reservations: Effect of—Withdrawals and Reservations: Reclamation Withdrawals—Withdrawals and Reservations: Temporary Withdrawals

Mining claims are properly declared to be null and void *ab initio* where they were located on lands withdrawn for reclamation purposes; the withdrawal cannot be deemed to have expired merely because it was stated to be for a temporary purpose and more than 19 years had elapsed before the first of the claims was located.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Mrs. Grace Kinsela has appealed to the Secretary of the Interior from a decision dated June 20, 1967, by the Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision dated October 12, 1966, by the Idaho land office declaring her Flap Jack, Rose, and Good Enough placer mining claims to be null and void *ab initio* because they were located on land included in a first form reclamation withdrawal.

The appellant contends that the withdrawal is no longer in force and effect because it was made on September 10, 1904, by a document which stated that the lands were "temporarily withdraw[n]" for reservoir sites under the Payette-Boise project. She states that section 3 of the Reclamation Act, June 17, 1902 (32 Stat. 388), 43 U.S.C. sec. 416 (1964), which authorizes first form withdrawals, provides that the Secretary shall diligently prosecute to completion surveys for contemplated irrigation works and shall restore lands to entry upon determining that the project is impractical. She asserts that nothing in the record shows that the Department has completed its studies of the Payette-Boise project, that the delay of 62 years is unreasonable, and that the withdrawal, being only temporary by its own terms, is of no further force and effect.

The Department has held that a withdrawal remains in effect until it is revoked, even though the purpose of the withdrawal may have been fulfilled. In *Richard R. Crandell*, A-24444 (November 12, 1946),

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the Department sustained the rejection of an oil and gas lease application for the reason that the land applied for had been withdrawn on February 10, 1902. The withdrawal was ordered because of proposals for legislation to donate the withdrawn lands to a State for a park. The fact that legislation was enacted in 1912 which did not include the land applied for was held not to affect the withdrawal as to that land.

Similarly, the Department has ruled that although land was "temporarily withdrawn" in aid of proposed legislation withdrawing the land for the protection of the water supply of the City of Los Angeles, the withdrawal remained in effect despite the fact that no legislation had been enacted in the 13½ years following the date of the withdrawal. *Clinton D. Ray*, 59 I.D. 466 (1947). The withdrawal in that case was made pursuant to the act of June 25, 1910, 43 U.S.C. sec. 141 (1964), which authorizes the President to "temporarily withdraw" lands for various purposes but provides that the withdrawals shall remain in force until revoked by him or by an act of Congress. In several other cases involving "temporary" withdrawals made under that act, it has been held that the withdrawals remain in effect until expressly revoked. *Mecham v. Udall*, 369 F. 2d 1 (10th Cir. 1966); *Wilbur v. United States*, 46 F. 2d 217, 219 (D.C. Cir. 1930), *aff'd*, 283 U.S. 414 (1931); *Shaw v. Work*, 9 F. 2d 1014 (D.C. Cir. 1925), *cert. denied* 270 U.S. 642; and *Jackson Hole Irrigation Company*, 48 L.D. 278 (1921). In the last case cited, the Department held that a withdrawal "in aid of pending legislation embodied in bill H.R. 11661, 65th Congress" did not cease to be in effect because the bill failed of enactment and no similar legislation was introduced.

Thus, the fact that a withdrawal is made on a temporary basis does not invest it with a self-limiting life which will expire before affirmative action is taken to terminate it. Appellant's contention that the reclamation withdrawal of September 10, 1904, quietly expired at some time raises the obvious question—when? Appellant refers to the 62 years lapse of time since the withdrawal was made as being unreasonable. But her Good Enough claim was located on October 18, 1923, the Rose on September 16, 1924, and the Flap Jack on May 24, 1929, periods of time ranging from approximately 19 to 25 years after the withdrawal was made. Was 19 years an unreasonable life span for a temporary withdrawal? Obviously, appellant's contention would throw into utter confusion the status of much withdrawn lands which were withdrawn for indefinite periods of time. For this and the other reasons stated her contention must be rejected.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A (4) (a) ; 24 F.R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

UNITED STATES
v.
C. B. MYERS Et Al.

A-30796

Decided November 21, 1967

Mining Claims: Discovery

A mineral showing which may lead a miner to stake a claim does not necessarily constitute the discovery which is required by the mining laws to validate a claim.

Mining Claims: Discovery

The rule of discovery followed by the Department is the test laid down in *Castle v. Womble*, and the Department has not required that a mining claimant show that he has found a mineral deposit which can assuredly be mined at a profit.

Mining Claims: Discovery

Mining claims are properly held to be null and void where only insignificant values in copper, gold, silver, and molybdenum have been found on the claims which would, at most, warrant only further exploration in an attempt to find valuable mineralization.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

C. B. Myers and Helen E. Myers have appealed to the Secretary of the Interior from a decision dated February 27, 1967, by the Acting Chief, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a hearing examiner's decision dated April 20, 1965, declaring the Soldier Peak Nos. 1, 2, 3, and 4 lode mining claims to be invalid because of lack of discovery.

The hearing examiner and the Acting Chief found that only insignificant mineral values had been found on the claims and that at the most they would indicate only that further exploration might be warranted.

The appellants have simply filed on their present appeal a copy of the brief which they submitted on their appeal from the hearing examiner's decision. In the brief they assert that the sole issue is "what

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is legally sufficient to constitute a valid discovery for lode mining purposes." They contend that the examiner's decision is wrong because (1) it is based on the assumption that a mineral deposit which is the basis of "locating" a mining claim must either be such that it can be mined at a profit or be shown to have a physical connection with a deposit known or proved to be of value sufficient to be mined at a profit (2) it is based on the erroneous premise that no legal discovery can exist unless the locator determines "by work done before staking his claim" that mineral exists of such quantity and nature that it can be mined at a profit, and (3) it is based on the erroneous theory that a reasonably prudent man is never justified "in staking a claim" and doing development work unless the mineral on which he based his location can be mined at a profit.

These allegations of error reveal two major misconceptions as to what the mining laws require and as to what the Department requires.

The first basic misunderstanding involves the following reasoning: The mining laws require that a discovery be made before a mining location can be made, *i.e.*, staked on the ground. The mining laws, however, recognize that risk and chance play a large part in mining and therefore anticipate that a reasonable prudent man will often feel justified in spending money and effort in development and further exploration of a claim based upon a discovery of a mineral deposit that is not of significant value. It is erroneous, therefore, to require that a miner know, *before staking a claim*, that minerals exists on the claim in such quantity and of such value that they can be mined at a profit. All that is required for a miner to stake a claim is to find a quantity of mineral in place, although it must be more than a trace or a mere indication. In short, the appellants argue, the discovery that is required to stake (locate) a mining claim is the only discovery that is required to validate a mining claim.

This is not true. It is well settled that although the mining laws treat discovery as the initial act and it may precede location (the acts whereby the boundaries of a claim are marked, etc.), "in the absence of an intervening right it is no objection that the usual and statutory order is reversed. In such a case the location becomes effective from the date of discovery; but in the presence of an intervening right it must remain of no effect." *Cole v. Ralph*, 252 U.S. 286, 296 (1920). Thus, it is not essential that the discovery required by the mining laws to impart validity to a claim must be made before the claim can be staked on the ground. A locator may stake a claim upon finding a mineral deposit of little value or even of no value. It follows that the mineral showing which may induce the staking of a claim does not necessarily

meet the standard of the discovery which is required to validate a claim.

Accordingly, we may accept appellants' argument that the mining laws permit a miner to take a chance and stake a claim when he has found a mineral deposit even though the deposit itself has little value. But, as we have just seen, it does not follow that the finding of such a deposit constitutes the discovery which is essential to make the claim valid.

The appellants' second basic misconception is that the examiner required as an element of a discovery that a miner find a mineral deposit of such value that it can be mined at a profit or that it be physically connected with a deposit which can be mined at a profit. This is not what the examiner held. The examiner's decision cited as the test of discovery the established prudent man rule of *Castle v. Womble*, 19 L.D. 455, 457 (1894)¹ that a discovery exists:

* * * where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, *with a reasonable prospect of success*, in developing a valuable mine * * *. (Italics added.)

"A reasonable prospect of success" does not mean a sure thing. The word "prospect" itself does not connote a certainty. In *Adams v. United States*, 318 F. 2d 861, 870 (9th Cir. 1963), Adams attacked a Departmental decision on the ground "that the agency decision required a demonstration on the part of Adams that the deposits could be worked at a profit." The court did not agree that the Department made such a requirement. It stated that the Department considered the relevant evidence " * * * not to ascertain whether assured profits were presently demonstrated, but whether, under the circumstances, a person of ordinary prudence would expend substantial sums in the expectation that a profitable mine might be developed. The agency did not, in this regard, apply an improper standard."

The examiner did not apply a standard of assured profitability. He applied no more than the rule in *Castle v. Womble*, case, *supra*, as the Department applied it in the *Adams* case, *supra*. That is the rule as to what constitutes a discovery within the meaning of the mining laws.

We now consider whether the application of the rule to the facts properly resulted in the conclusion that appellants' claims are invalid. There is little or no dispute as to the facts brought out at the hearing. They are set forth in detail in the examiner's decision. The Government called one witness, Harve Ashby, a mining engineer, who examined the claims on three dates and took seven samples. Five samples were taken on the Soldier Peak No. 1, four in the shaft on the claim

¹ Affirmed in *Chrisman v. Miller*, 197 U.S. 313 (1905), and *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334 (1963).

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and one on the surface near the shaft (Ex. 5 and 6). Ashby did not sample the remaining two claims, apparently because he found no excavations worthy of examination (Tr. 55).

Of the seven samples none showed any significant values in gold, silver, or zinc or any value in lead (Ex. 3.0, 3.1, 3.2). One sample, Myers No. 1, from the shaft on the Soldier Peak No. 1 showed a value of .027 percent in molybdenum, but Ashby testified that this was of no economic significance (Tr. 25-26). Sample Myers No. 2, a 2½ foot chip sample from the same shaft, showed a copper value of 1.08 percent, or "about \$6, six and a half" (Tr. 57), but Ashby said it had no lateral extent as another sample taken close by ran only .02 percent in copper.² Sample Myers No. 3, taken in the same shaft, showed 6.87 percent copper, a value of \$40 per ton, but Ashby dismissed it as an "interesting curiosity" since it was taken across only 2½ inches of material (Tr. 58).

The appellants also called only one witness, Ezra H. Lewis, a registered geologist. Lewis took one sample in the shaft on the Soldier Peak No. 1 which showed no significant values in gold or silver or molybdenum but 3 percent copper. It was taken near Ashby's Myers No. 2, which showed 1.08 percent in copper. In explanation of the difference Lewis said his sample might not have been taken laterally in the same place in the vein and that his sample was only 18 inches as compared with Ashby's 2½ foot sample. Lewis conceded that "in a mining situation you mine much more rock than the 18 inches, so this, I think, is due to delusion * * *" (Tr. 78). Ashby said in rebuttal that a minimum mining width was 4 feet and that the minimum mining cost would be \$26, the value of the minerals in Lewis' sample (Tr. 83).

Lewis took one sample on the Soldier Peak No. 2, two samples on Soldier Peak No. 4, and none on Soldier Peak No. 3. None of the three samples showed any significant values in gold, silver, copper, or molybdenum.

In summation Lewis testified that he was not able to draw any positive conclusions as to the extent and nature of the mineralization in the claims but that he had a doubt —

A. As to its being not feasible in the future, or presently. I will concede that presently I would not attempt to work it. In other words, I feel that the claims have not been explored to the extent that you can rule out economic mineralization. * * * (Tr. 72.)

² Ashby referred to this sample as Myers No. 6 but obviously intended to refer to Myers No. 5, having .04 percent copper, since Myers No. 6 was taken from the Soldier Peak No. 2.

He further testified that there was the possibility of a copper vein in the claims and that it would be worthwhile exploring this possibility (Tr. 77).

The only reading that can be given to Lewis' testimony is that the appellants have not yet found any mineral deposit that has economic significance and would be worth developing but that the appellants would be warranted in spending their time to explore for such a deposit. The Department has repeatedly held that to constitute a discovery there must be the finding of a mineral deposit of such value that a prudent man would be justified in the expenditure of labor and money in *developing* the deposit, with a reasonable prospect of success, and that it is not a discovery if the mineral showing is only such as would warrant further *exploration* in the hope of finding such a deposit. See the full discussion of this point in *United States v. Kenneth O. Watkins and Harold E. L. Barton*, A-30659 (October 19, 1967), and in *Converse v. Udall*, 262 F. Supp. 583, 595 (D. Ore. 1966), appeal docketed, 9th Cir.

Clearly, on the basis of their own witness' testimony, the appellants have not made a discovery on any of their claims.³

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4) (a); 24 F. R. 1348), the decision appealed from is affirmed.

ERNEST F. HOM,
Assistant Solicitor.

JACOB N. WASSERMAN

A-30802

Decided November 22, 1967

Oil and Gas Leases: Applications: Description—Surveys of Public Lands: Generally

A description in an acquired lands oil and gas lease offer of a parcel of land smaller than a quarter-quarter section embraced within a public land survey and purportedly in conformity with it must describe the subdivisions of the quarter-quarter section in the same manner as larger subdivisions of a section and quarter-section would be described, and cannot merely give a proportionate ratio, such as the "E $\frac{1}{4}$ " of the quarter-quarter section, unrelated to the quadrant method upon which the public land surveys are based and understood.

³ This is especially true with respect to the Soldier Peak No. 3 which was not even sampled by Lewis and on which no cuts or other exposure of mineralization was even claimed to exist.

November 22, 1967

Oil and Gas Leases: Applications: Description—Oil and Gas Leases: Cancellation—Oil and Gas Leases: Description of Land—Oil and Gas Leases: First Qualified Applicant

The description in an acquired lands oil and gas lease offer of a parcel of land in a surveyed section of the "E $\frac{3}{4}$ of SE $\frac{1}{4}$ NW $\frac{1}{4}$ " of the section is defective, and a lease issued pursuant to the offer must be canceled as to that parcel where a junior offer properly describes the land in conformity with the rules of the public land survey system as the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Jacob N. Wasserman has appealed to the Secretary of the Interior from a decision by the Chief, Branch of Mineral Appeals, Office of Appeals and Hearings, Bureau of Land Management, dated March 17, 1967, which affirmed a November 9, 1966, decision of the Eastern States land office rejecting in part his oil and gas lease offer, BLM-A 080851, as to the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$, E $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 16, T. 19 N., R. 13 W., Mich. Mer., Michigan, for the reason that those lands were included in outstanding lease BLM-A 080768, issued effective June 1, 1966, to the McClure Oil Company.

Appellant's lease offer was filed May 5, 1965, and the McClure lease offer was filed April 7, 1965. Appellant contends that his offer is the first qualified offer to describe the land properly, as McClure's offer described the land as the "E $\frac{3}{4}$ of SE $\frac{1}{4}$ NW $\frac{1}{4}$ " and the lease issued for the same description. The Bureau held that the description in the McClure offer was acceptable because although it is not a precise reference in terms of the regular quarter-quarter section aliquot parts of the subdivision, it nevertheless establishes a proportionate division of the lands in the subdivision and clearly includes the same lands described as the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ sec. 16, and also conforms to a description in the deed conveying the land to the United States, and can adequately be identified. Appellant, however, contends that error in the Bureau's decision is demonstrated because it also attempts to reform the lease by purporting to revise the lease description to that stated in his offer. He contends that the description stated by McClure in his offer is erroneous, improper, and contrary to regulation 43 CFR 3212.1(a)(3)(i). This, the governing regulation here, provides in pertinent part that:

If the land has been surveyed under the rectangular system of public land surveys, and the description can be conformed to that system, the land must be described by legal subdivision, section, township, and range. Where the description cannot be conformed to the public land surveys, any boundaries which do not so conform must be described by metes and bounds, giving courses and distances between the successive angle points with appropriate ties to the nearest existing official survey corner. * * *

Although the Bureau held that the description in lease offer BLM-A 080768 satisfied this regulation, it justified its conclusion in part on the fact that the description conforms to the description in the deed conveying the land to the United States. There is a provision in the regulation requiring land applied for to "be described as in the deed or other document by which the United States acquired title to the lands or minerals," 43 CFR 3212.1.(3)(ii). However, this provision applies only where the land has not been surveyed under the rectangular system of public land surveys. The fact that the description in a deed was found acceptable for the purpose of obtaining title does not mean that the description is acceptable for other purposes. Since the land desired here is within a section which has been surveyed under the public land survey system and is shown on the plat of survey as being a regular 640-acre section, the paragraph of the regulation above-quoted governs rather than the portion of the regulation applicable where lands have not been surveyed; consequently, the fact that the description conforms to the deed is not relevant to the issue of whether it meets the requirements of the above-quoted regulation.

No question has been raised as to whether the tract in question can be described in conformity with the public land survey system.¹ The only question presented therefore is whether McClure's description of the tract as the "E $\frac{3}{4}$ of SE $\frac{1}{4}$ NW $\frac{1}{4}$ " was a description by "legal subdivision."

Both McClure's and appellant's descriptions purport to describe a portion of a quarter-quarter section. Although it is often said that a quarter-quarter section (or a lot) is the smallest legal subdivision, this does not mean that subdivisions of a quarter-quarter section are not considered "legal subdivisions" within the meaning of public land and mineral laws and regulations authorizing the leasing or other disposition of parcels of land less than 40 acres in size. However, if the subdivisions are based upon the principles of the rectangular public land survey system, the subdivisions must be designated in the same manner as that in which subdivisions are designated for larger subdivisions of a section, *i.e.*, in terms of aliquot portions of the subdivisions. This may be easily done by following the survey principles for the larger subdivisions of a section. If, however, an area of land is desired which is irregularly shaped, of disproportionate size, and otherwise not conformable to the regular square and rectangular subdivisions, it must be described by metes and bounds. An example of this would be a description excluding a right-of-way.

¹ If the description could not be so conformed, the above-quoted regulation required that the nonconforming boundaries be described by metes and bounds. Thus, if it did not conform to the public land survey system, the description in appellant's offer as well as that in McClure's offer would be defective since neither gave a metes and bounds description.

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The Bureau justified upholding the description of the "E $\frac{3}{4}$ of SE $\frac{1}{4}$ NW $\frac{1}{4}$ " under the regulation on the ground that it established a proportionate division of the lands in the subdivision which could be ascertained. This justification, however, reflects a misunderstanding of the public land survey system. The survey laws (see 43 U.S.C. sec. 751 *et seq.*) expressly provide for the subdivision of sections into halves, quarters, halves of quarters, and quarter-quarters. As stated by the Supreme Court in *Brown v. Clements*, 44 U.S. (3 How.) 650, 663 (1845):

The settled policy of Congress has been to survey the public lands in square figures, running the lines north and south, and east and west, and to extend the subdivisions authorized by law, as far as practicable, in square figures, to the lowest denomination.

To the same effect see *Keyser v. Sutherland*, 26 N.W. 865, 867 (Mich. 1886).

In describing lands under the public land system the use of the fractions " $\frac{1}{4}$ " and " $\frac{1}{2}$ " have definite meanings of representing one-quarter and one-half. These terms are used in relation to a compass direction such as the "E $\frac{1}{2}$ "—the east half, or "NW $\frac{1}{4}$ "—the northwest quarter. They are not used with reference to quantity—as designating a proportion of the whole section necessarily—but are used with reference to the boundary lines of the parcel subdivided in accordance with the system established by Congress. See *Jones v. Pashby*, 29 N.W. 374, 378 (Mich. 1886). Under this system the subdivision of a section into halves and quarters and smaller units is based upon a quadrant, with the quadrant being divided into four quarter sections. Each quarter section is identified by its compass direction—NE, SE, SW, NW. These quarter divisions, known as "aliquot" parts, are always described in relation to the four points of the compass. See *Surveying Our Public Lands*, U.S. Dept. of the Interior, BLM, 1960, p. 7. The quarter section can further be divided into halves and into quarter-quarters, which can be further subdivided into areas as small as 5 acres, or 2 $\frac{1}{2}$ acres, or 1 $\frac{1}{4}$ acres. *Id.* However, in following this system all such subdivisions are in relation to a quadrant. See, *e.g.*, definition of "quarter-quarter sections": and "quarter section" in *Glossary of Public Land Terms*, U.S. Dept. of the Interior (1959 reprint).

The division of a section or a subdivision into quarters thus is always in relation to a quadrant and not to any other segment of the whole subdivision even though its proportionate area ratio to the whole is 1 to 4, as is a quarter section in a regular section containing 640 acres. This point is demonstrated in a case where land was described as the "N $\frac{1}{4}$ " of a section. *Duncan Miller*, A-28767 (July 23, 1962). In that case, Miller argued that the description of land as the "N $\frac{1}{4}$ " was

clearly understandable as meaning the same as the " $N\frac{1}{2}N\frac{1}{2}$." However, this argument was rejected and the decision stated that the description was not acceptable as a description of any legal subdivision of a section and was ambiguous and meaningless. The case involved the application of a regulation having language somewhat similar to that involved here as to the necessity of describing land by "legal subdivision."

The *Miller* case, *supra*, is indistinguishable from the present case. If the " $N\frac{1}{4}$ " of a section is not a description by legal subdivision, neither would the " $N\frac{3}{4}$ " of a section be a description by legal subdivision (as a substitute for $N\frac{1}{2}$ and $N\frac{1}{2}S\frac{1}{2}$). " $E\frac{3}{4}$ " is indistinguishable from " $N\frac{3}{4}$ " or " $N\frac{1}{4}$ " and likewise cannot be accepted as a description by "legal subdivision." If the description " $E\frac{3}{4}$ of $SE\frac{1}{4}NW\frac{1}{4}$ " is read, as the Bureau apparently read it, as the "east three-fourths" of the subdivision, it is not consistent with the public land survey system as it does not state true aliquot parts of a legal subdivision, but simply a proportionate ratio of land within the subdivision. The fact is that under the public land survey system only certain forms of description have been deemed acceptable and others are not. See *Robert P. Kunkel*, 74 I.D. 373. We must conclude that the description of the " $E\frac{3}{4}$ of $SE\frac{1}{4}NW\frac{1}{4}$ " is not a proper description of a legal subdivision within the meaning of the regulation quoted previously and that, therefore, the McClure offer was defective as to such land.²

Where a lease has issued pursuant to an offer which was defective as to lands in conflict with a junior offer which is acceptable as to such lands, the lease must be canceled to the extent of the conflict so that the junior offeror's statutory preference right to a lease might be satisfied unless there are other reasons under the law and regulations which would preclude such action. *Duncan Miller*, A-30600 (December 1, 1966); *Boesche v. Udall*, 373 U.S. 472 (1963).³ Therefore, unless there are such reasons, lease BLM-A 080768 must be canceled as to the land described in the offer as the " $E\frac{3}{4}$ of $SE\frac{1}{4}NW\frac{1}{4}$ " and appellant's offer accepted as to the land described as the " $E\frac{1}{2}SE\frac{3}{4}NW\frac{1}{4}$ " and " $E\frac{1}{2}W\frac{1}{2}SE\frac{3}{4}NW\frac{1}{4}$ " of section 16.

Accordingly, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), the Bureau's decision is reversed and the case is remanded to the Bureau

² If the " $E\frac{3}{4}$ of $SE\frac{1}{4}NW\frac{1}{4}$ " is acceptable, so would be " $E\frac{1}{8}$ of $S\frac{1}{2}NW\frac{1}{4}$ " (for $E\frac{1}{2}E\frac{1}{2}SE\frac{1}{4}NW\frac{1}{4}$) or " $NE\frac{1}{16}$ of $NE\frac{1}{4}$ " (for $NE\frac{1}{4}NE\frac{1}{4}NE\frac{1}{4}$), etc. Such descriptions have never been accepted as descriptions by legal subdivision in accordance with the public land survey system.

³ The McClure lease was issued despite the pendency of appellant's protest against the issuance of the lease and before the protest was acted on.

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of Land Management for appropriate action consistent with this decision.

ERNEST F. HOM,
Assistant Solicitor.

ADOPTION OF INDIAN CHILDREN IN STATE COURTS

Indians: Domestic Relations—Indians: Civil Jurisdiction—Indians: Care of Children

Where Indian court has properly terminated the relationship of natural Indian parents to a child, Indian court standing *in loco parentis* may submit child to the jurisdiction of state courts to secure his adoption, regardless that child is resident of an Indian reservation.

M-36714

November 30, 1967

TO: COMMISSIONER OF INDIAN AFFAIRS.

ATTENTION: ASSISTANT COMMISSIONER, COMMUNITY SERVICES,
FIELD SOLICITOR, BILLINGS, MONTANA.

SUBJECT: JURISDICTION OF STATE COURTS TO ENTERTAIN ADOPTION PROCEEDINGS INVOLVING INDIAN CHILDREN.

The Field Solicitor, Billings, Montana, in a memorandum dated June 28, 1967, and officers of the Bureau of Indian Affairs, in conferences held both in the field and at headquarters, have requested our opinion as to the legality of the following procedure:

An Indian child residing on a reservation is produced before a tribal court upon a proper petition alleging that he is dependent and neglected and that his natural Indian parents have demonstrated that they are unable or unwilling to provide the care and support he requires, and praying that the parent-child relationship and the rights of the parents with respect to the child be terminated. After proper proceedings in the tribal court a decree is entered terminating the rights of the parents with respect to the child and making the child a ward of the court. Thereafter, the tribal court, or an agency or person acting on its behalf and as its instrument, presents the child to an appropriate state court for the purpose of invoking state procedures to procure his adoption. Alternatively, we suppose, the tribal court or its agent may place the child with an appropriate state agency which in turn invokes the jurisdiction of the state court to procure his adoption.

It has been suggested that state courts are without jurisdiction to entertain adoption proceedings brought in this manner because the Indian child concerned is a resident of an Indian reservation. This

suggestion apparently proceeds from some such premise as state courts are without jurisdiction over Indians on Indian reservations.

The suggestion is without substance. Under the circumstances posed there can be no doubt that the state court would have jurisdiction to entertain adoption proceedings brought on behalf of an Indian child.

Indian reservations are not extraterritorial to the states wherein they are located. They are places where special laws often apply to Indian people. But the Indian residents of a reservation are full citizens of the state wherein they reside, as well as of the United States, and are entitled to all the rights and privileges appertaining to that status.¹

With respect to many subject matters, Indian activities on Indian reservations are subject to special Federal and tribal jurisdictions which are exclusive of the States'. For example, where a state has not been given or assumed such jurisdiction,² special and exclusive jurisdictions exist in the Federal and tribal governments to take cognizance of offenses committed by or against Indians on Indian reservations.³ Similarly, special jurisdictions, exclusive of the states', have been assigned to tribal governments with respect to reservation-based transactions involving Indians and with respect to matters involving internal government.⁴ On the other hand, the maxim that Indian reservations are not extraterritorial to the states wherein they are located, is demonstrated by the fact that generally the states possess exclusive jurisdiction of activities thereon which involve neither Indian persons, property nor affairs. The states, for example, have long been conceded exclusive jurisdiction over offenses committed by non-Indians against non-Indians on Indian reservations.⁵ Again, it has long been recognized, with some important exceptions not here relevant, that the off-reservation activities of Indians are within the cognizance of the states and their courts. In short, Indians, simply because of their status as such, are neither beyond state jurisdiction or disqualified to invoke it. Although it cannot be said that, for purposes of jurisdiction, the Indian reservation is wholly without territorial significance (because the special and exclusive jurisdictions over certain subject matters involving Indians which have been assigned to the Federal and tribal governments are frequently coterminous with the Indian reservation or country), the touchstone of jurisdiction in cases involving Indians is ultimately neither personal status nor the situs of the activity. It is, rather, the subject matter.

¹ *Kake Village v. Egan*, 369 U.S. 60 (1962).

² See act of August 15, 1953, 67 Stat. 588, as amended, 28 U.S.C. sec. 1360 and 18 U.S.C. sec. 1162 (1966).

³ See 18 U.S.C. secs. 1151-1153 (1966). *Williams v. United States*, 327 U.S. 711 (1946).

⁴ *Williams v. Lee*, 358 U.S. 217 (1959).

⁵ *United States v. McBratney*, 104 U.S. 621 (1881).

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The shibboleth that a state categorically is without jurisdiction over Indians on Indian reservations does not survive analysis. The hoary authorities customarily cited to support it, products of an era in which Indian tribes were truly regarded and treated as foreign nations, have little relevance in the seventh decade of the 20th Century.⁶

There is no generic bar to a state's exercising jurisdiction over Indians on reservations. There are, however, broad classes of matters which have been subjected by Federal law to exclusive Federal or tribal cognizance. Internal government and the relations of members *inter se* are examples of classes of matters over which jurisdiction has been left by the Federal Government largely in the tribes. The test of the propriety of state action which approaches these areas is whether it interferes with powers reserved to the tribes.⁷

Clearly, the activity of the state courts in the situation posited does not interfere with reservation self-government. Indeed, it is positively in aid of it. It may be that the legality of the procedure here could be sustained on other grounds, because it likely entails the physical presence of the child before the state court, off the reservation. As noted, it has long been recognized that Indians off the reservation are generally subject to the jurisdiction of the state courts, just as other citizens. We are satisfied that there can be no question of the competence of a state court to entertain adoption proceedings on behalf of an Indian child under the circumstances presented because the exercise of such jurisdiction does not involve trespass upon any area reserved to the exclusive cognizance of the Federal or tribal governments.

It is difficult to conceive what possible impediment to a state court's jurisdiction could be suggested were the natural parents of an Indian child to bring the child before the court for the purpose of terminating their relationship to him and securing his adoption. In the circumstances presented, assuming that the parental relationship has been properly terminated by the tribal court, that court then stands *in loco parentis* and has the same power as had the natural parents to submit the child to the jurisdiction of a state court to secure his adoption.

The adoption laws and practices of most states are worked into relatively refined programs administered by the courts and welfare agencies to protect the interests of dependent children and to find good foster homes for those needing them. Programs of the sort conducted by the states are generally beyond the capacities and resources of tribal governments. The transcendent concern must be the welfare of the children and where tribal governments chose to utilize state programs

⁶ *Kake Village v. Egan*, *supra*.

⁷ Compare *Williams v. Lee*, *supra*, with *Kake Village v. Egan*, *supra*.

for securing the adoption of dependent Indian children they should not be deterred by the interposition of baseless legal objections.

RICHMOND F. ALLAN,
Associate Solicitor.

APPROVED:

EDWARD WEINBERG,
Deputy Solicitor.

ZELLA HAMLIN

A-30689

Decided November 30, 1967

Script: Valuation of Land—Soldiers' Additional Homesteads: Classification—Taylor Grazing Act: Classification

In determining what land is to be classified under section 7 of the Taylor Grazing Act and the act of August 31, 1964, as suitable for the satisfaction of scrip, including soldiers' additional homestead rights, the Secretary may fix a maximum value per acre as one of the factors to be considered and reject applications for lands whose per acre value is in excess of the maximum limitation.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

Zella Hamlin has appealed to the Secretary of the Interior from a decision dated June 10, 1966, of the Acting Chief, Office of Appeals and Hearings, Bureau of Land Management, which affirmed a decision of the Nevada land office rejecting her application to have a parcel of land classified as suitable for satisfaction of her soldiers' additional homestead rights issued pursuant to 43 U.S.C. sec. 274 (1964).

Mrs. Hamlin is the holder of the rights by mesne conveyances and has adopted the application filed on April 30, 1962, by her assignor, Emmett M. Hamlin, her husband, now deceased, to enter 50 acres of public land described as the SW $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ NW $\frac{1}{4}$ SE $\frac{1}{4}$, sec. 28, T. 20 N., R. 20 E., MDM, Nevada.

The land applied for lies about 800 feet north of the city limits of Sparks, Nevada, which, in turn, is a suburb of Reno. Both cities have been enjoying a rapid increase in population growth and apparently will continue to expand. Physically, the land varies from level to rough and rocky terrain, but is predominantly of moderate slope. Its location and elevation make it well suited for residential use and it has been appraised at \$3,000 per acre.

The appellant, or her husband, located mining claims in 1928 on the lands and have maintained them, although appellant now admits

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in her application that the land is nonmineral.¹ It also appears that about 1930 a corporation built and operated an explosives plant on the land. The enterprise proved unsuccessful and ceased operations in 1932; the buildings, however, are still standing.

The land is among the lands withdrawn from all forms of appropriation and reserved for classification by Executive Order No. 6910 of November 26, 1934. Section 7 of the Taylor Grazing Act, as amended, 43 U.S.C. sec. 315(f) (1964), authorizes the Secretary, "in his discretion, to examine and classify" such withdrawn land and, when he finds it proper for satisfaction of scrip rights, to open it up to selection. 43 CFR 2410.0-3(a). The land office rejected the application on the grounds (1) that the lands did not qualify as agricultural lands under the homestead laws, 43 U.S.C. sec. 161 *et seq.* (1964), and are consequently not eligible for satisfaction of soldiers' additional rights and (2) that the highest and best use of the selected tract is for residential development.

In his decision on appeal, the Acting Chief, Office of Appeals and Hearings, held that it was unnecessary to determine whether the land is suitable for agricultural development as contemplated by the soldiers' additional homestead law, *supra*, because the highest and best use of the land is for residential development or for use as community or industrial sites and the public interest requires that the land be maintained for such purposes and that appellant's application must be rejected for this reason alone. In support of this conclusion, he relied upon the location of the land, the expansion of the neighboring cities, a residential development abutting the tract, its current zoning as one-acre residential, and its value of upward of \$3,000 per acre.

In her appeal to the Secretary, Mrs. Hamlin urges that the Acting Chief's decision did not properly take into account the facts and history surrounding her application and that since a portion of the land applied for, comprising 22.95 acres, had been withdrawn prior to Executive Order No. 6910 it was not subject to the order and she is entitled at least to the 22.95 acres.

In her brief to the Director, Bureau of Land Management, the appellant also adverted to a recent statute, the act of August 31, 1964, 78 Stat. 751, in which the Congress set out a plan for finally satisfying all scrip and similar claims, including soldiers' additional rights. In part, it required the Secretary to classify lands of a certain value for selection by scrip or similar claim holders. In the alternative, it provided for the redemption of these rights for cash at the average value of the land classified by the Secretary as suitable for the satisfaction of the various

¹ On April 19, 1963, Mrs. Hamlin filed a notice of location of a lode claim on part of the lands she has applied for.

categories of scrip. In *Regulations* issued on August 18, 1966, 43 CFR 2222.1-07 (e) and (f), after Mrs. Hamlin filed her brief to the Director, the value of lands to be classified as suitable for satisfaction of soldiers' additional homestead claims was set at not less than \$250 and not more than \$275 per acre.

The earlier withdrawal mentioned by Mrs. Hamlin was made by a Departmental order of December 10, 1920, which withdrew certain lands in Nevada for reclamation purposes as a first form withdrawal in connection with the Newlands Project, Nevada. After several partial restorations of parts of the area withdrawn, the portion of the 1920 withdrawal covering the land applied for by Mrs. Hamlin was revoked and the land opened to application, selection and location by P.L.O. 2859 of January 18, 1963 (28 F.R. 637). While the land was in the reclamation withdrawal, it was not open to mineral location or any other application. 43 CFR 2323.1-1; *David W. Harper et al.*, 74 I.D. 141 (1967); *Ralph M. Bostrom*, A-27806 (December 23, 1958); *Harry A. Schultz et al.*, 61 I.D. 259 (1953). Therefore, the Hamlin mining locations are invalid insofar as they cover land which was withdrawn when they were made in 1928. Similarly, an application to exercise soldiers' additional rights on land withdrawn from all forms of disposition is subject to rejection for that reason alone. *Philip Rex Kleitz*, A-30315 (June 8, 1965); *Atherton Sinclair Burlingham et al.*, 71 I.D. 126, 128 (1964).

Upon the revocation of the reclamation withdrawal the lands it had covered became subject to the withdrawal made by Executive Order No. 6910. Executive Order No. 7048, May 20, 1935; 43 CFR 297.14 (1949 Ed.) Thus, the Hamlin application cannot serve to exclude any of those lands, *i.e.*, the 22.95 acres, from the general withdrawal or give her any valid rights or equitable claims which she has not otherwise earned. That the land office did not reject her application *pro tanto* as to the 22.95 acres for this reason does not help her, for it is well established that an applicant cannot gain rights in public land to which he is not entitled on the basis of erroneous advice of a government official. *United States v. Richard Dean Lance*, 73 I.D. 218 (1966). If mistaken advice cannot help her, mere inaction can be of no greater benefit. In any event, since the land office rejected her application in its entirety, it is difficult to grasp how she can be aided by the contention that her application should have been rejected in part for a different reason.

The appellant also emphasizes her long association with the land she desires. As she puts it, she and her husband have been interested

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in it since they located mining claims on it in 1928, followed by the construction of an explosives plant in the early 1930's. Since the mineral activities were fruitless and the appellant now asserts that the land is nonmineral, there does not seem to be any reason to create "equities" out of the mere assertion of invalid mining claims. The erection of the explosives plant on the land is even less deserving of winning sympathy, for there does not seem to be any justification for devoting unpatented (and invalid) mining claims to such a purpose. The most that can be said for the Hamlins' relationship to the land applied for is that they asserted claims to it for almost 40 years without being able to establish any right to it as mining land or to justify its use for non-mineral purposes.

We are left then with the appellant as an applicant for the satisfaction of soldiers' additional rights by the transfer to her of 50 acres of extremely valuable public land. The Department has been quite concerned with the problems raised by attempts of scrip holders to acquire lands of the highest value and has been reluctant to patent such lands to them.

In 1963 the Department proposed legislation to establish a value standard for lands deemed proper for acquisition in satisfaction of outstanding scrip. As amended, the Department's proposal became the act of August 31, 1964 (*supra*). In his statement to the Senate subcommittee holding a hearing on the bill as amended by the House of Representatives, the form in which the bill was enacted, the Assistant Secretary Carver, Department of the Interior said:

* * * * *

Since the passage of this bill by the House, we have been giving thought to its prompt implementation if enacted into law. While the bill sets a minimum value requirement it is not specific as to any maximum values. In classifying lands as suitable for scrip selection as provided by section 3(a) it is apparent that the appraised values will, in all probability, range above the minimum with some timbered tracts having values of several thousand dollars an acre. A value standard is needed to preclude the taking of high-valued resources. For example, timber on a single acre of land in western Oregon may be worth as much as \$4,500. The absence of a maximum value standard might permit a windfall to scrip holders, and continues the difficulty between the holders and the Government.

It is our intent, if the bill is enacted in the House-passed form, to offer scrip holders lands ranging in value from the average fair market value as prescribed in section 3(a) to approximately 10 percent above that average value.

It is our belief that it would be reasonable, and it is our intention if the bill is enacted in its present form, to instruct State directors and district managers to classify lands as suitable for satisfaction of scrip claims only if the lands so

classified have fair market value within the range of 10 percent above the average fair market value prescribed in section 3(a) as the statutory floor. (Hearings on H.R. 4149 before the Subcomm. on Public Lands of the Senate Comm. on Interior and Insular Affairs, 88th Cong., 2d Sess. 9).

The only non-Departmental witness to appear stated: (Mr. Slade Gorton, of the firm of Little, Gandy, Stephan, Palmer & Slemmons, Attorneys at Law, Seattle, Washington)

* * * * *

I should say that Secretary Carver told me yesterday about the two problems he has just raised with you. In working with the Department and in drafting the House amendments, we feel that his interpretation in both cases is the proper one. We would not expect the Department to go much above the floor established in the act, and we certainly feel it proper to consider only those applications granted between the date of the recording act and the date that H.R. 4149 becomes law as the base and not a rolling adjustment (*Id.* 15.)

The Senate report (S. Rep. No. 1455, 88th Cong., 2d Sess.) made no comment on this part of the Department's testimony.

After further consideration of the act of August 31, 1964, *supra*, the Department came to believe that additional legislation was necessary to make plain its position that it could set a maximum value on land it classified pursuant to section 7 of the Taylor Grazing Act, *supra*, as suitable for acquisition for the satisfaction of scrip and similar rights. In its identical letters of June 11, 1965, to the President of the Senate and the Speaker of the House, the Department reviewed the scrip problem and suggested some remedies:

Enclosed is a draft of a proposed bill to amend the act of August 31, 1964 (78 Stat. 751), relating to the satisfaction of scrip and similar rights.

We recommend that the proposed bill be referred to the appropriate committee for consideration, and we urgently recommend that it be enacted.

Section 7 of the Taylor Grazing Act provides that the Secretary of the Interior is authorized to examine and classify any public lands which are proper for acquisition in satisfaction of any outstanding scrip rights and to open such lands to selection for disposal in accordance with such classification. The act gives no legislative guidance as to the types or value of land that may be proper for acquisition. Absent such guidance, there has been little progress over the years toward satisfying scrip rights. The main problem has been one of land value. As a general rule scrip holders have selected the highest value lands. The Department has been reluctant to patent such high value lands.

Realizing that the final satisfaction of all outstanding scrip, some of which, issued more than a century ago, was desirable, both from the standpoint of the holders of scrip and of the Government, this Department, in 1963, proposed legislation to establish a value standard for lands proper for acquisition in satisfaction of such outstanding scrip. This proposal, as amended, culminated in the enactment of Public Law 88-545 to provide for the satisfaction of claims arising out of scrip, lieu selection, and similar rights.

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It was the Department's proposal that the land offered in satisfaction of scrip would be " * * * of a value per acre of at least the average price received for land sold under the Small Tract Act during the 3 years prior to the date of appraisals of the offered lands." The average value of small tracts in 1963 was roughly \$200 per acre.

Throughout consideration of the proposed legislation this Department constantly urged that a value standard be adopted, preferably a specific maximum dollar figure per acre. We proposed that the act provide that "no property having a value greater than \$—— per acre of scrip right to be satisfied under this act shall be conveyed by the Secretary under this Act."

The Department is now faced with a dilemma in implementing Public Law 88-545. The act sets a minimum value but no maximum value of the lands which may be offered in satisfaction of the scrip. Preliminary appraisals of lands patented for Valentine scrip indicate a minimum value on the order of \$1,250 per acre. We are concerned that this figure may be substantially in excess of what Congress was led to believe it would have been under the formula adopted. During consideration of the bill we advised the Congress, upon the limited information then available, that the value of lands patented in satisfaction of the Valentine scrip was about \$750 per acre.

The act is being interpreted by scrip holders as placing no upper limit on the value of land for which they may apply. One pending application covers land having a fair market value of approximately \$4,000 per acre. In view of the legislative history of Public Law 88-545, we have grave doubts that the Congress contemplated or intended this result. We did not envision any such result. One Valentine scrip holder testified before the House Public Lands Subcommittee indicating payment for Valentine scrip at about \$500 per acre.

While we have hesitated heretofore to recommend a specific figure to the Congress, we now believe that a maximum value of \$500 per acre, an amount equal to that cited in testimony, would be equitable both to scrip holders and to the Government. * * * 111 Cong. Rec. 18030.

The pertinent provision of the proposed bill read :

(c) Adding thereto a new section reading as follows :

"Sec. 7. Notwithstanding any provision of this Act to the contrary, no public lands having a value in excess of \$—— per acre shall be patented under this Act in satisfaction of any claim or holding recorded under the Act of August 5, 1955 (69 Stat. 534, 535), and no payment in cash made under this Act shall exceed \$—— per acre for any such claim or holding."

The Department's proposal was introduced as S. 2321, 89th Cong., and H.R. 10193, 89th Cong. At hearings held in August 1965 before the proper subcommittees of the House and the Senate the Department's viewpoint was emphasized by its witnesses while other witnesses opposed or accepted the concept of a maximum value as a proper aspect of classification of land as suitable for satisfaction of scrip rights.

On September 9, 1965, the Secretary of the Interior wrote to the chairman of each of the congressional committees as follows :

DEAR MR. CHAIRMAN:

During the recent hearings on H.R. 10193, the question arose as to what action this Department would take to satisfy scrip claims if the act of August 31, 1964 (78 Stat. 751), was not amended.

In the event that Congress does not act on the proposed amendment currently under consideration, we will proceed to carry out the directives of the 1964 act and we will take prompt action on all pending scrip applications. We intend to offer scripholders lands ranging in value from the average fair market value as prescribed in section 3(a) of the 1964 act to approximately ten percent above that average value. In this connection, we interpret section 3(a) to mean that the average fair market value will be based on conveyances from August 5, 1955 to August 31, 1964. This course of action is the same as that indicated by then Assistant Secretary Carver in his August 10, 1964 letter to you regarding H.R. 4149, 88th Congress.

Another question which arose at the hearings dealt with the Department's interpretation of that portion of section 3(a) of the 1964 act which directs the Secretary to classify public lands "in sufficient quantity so as to provide each holder of such claim with a reasonable choice of public lands against which to satisfy his claim." We believe that classification of approximately three times the acreage of recorded claims or 30,000 acres would satisfy the directive to provide a reasonable choice. Some lands would be classified in each of the public land States with the majority of the land classified in those States in which scrip-holders had indicated an interest.

We hope that these comments will assist the committee in its consideration of H.R. 10193.

Sincerely yours,

/s/ STEWART L. UDALL,
Secretary of the Interior.

The Under Secretary of the Interior appeared before the House subcommittee on February 10, 1966, to explain the Department's position that, while it desired a Congressional statement imposing a limitation on the maximum value per acre of land to be patented in satisfaction of scrip, it had also concluded that it had the authority to settle outstanding scrip on the same basis under the 1964 act.

In a letter to the Secretary, dated March 21, 1966, the chairman of the House Committee on Interior and Insular Affairs wrote:

DEAR MR. SECRETARY:

As you are aware, this Committee has considered extensively H.R. 10193, a proposal introduced as a result of a request from your Department to amend the act of August 31, 1964 (78 Stat. 751), relating to the satisfaction of scrip and similar rights. The act of August 31, 1964 (78 Stat. 751), was also introduced at the request of your Department and, among other things, placed a minimum value limitation on land which could be exchanged for scrip. The primary purpose of H.R. 10193 was to establish a maximum value limitation on land exchanged for scrip which the act of August 31, 1964, failed to do.

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From testimony received by this committee, it now appears that the Department of the Interior is no longer of the opinion that enactment of H.R. 10193 is necessary, but that an equitable administrative solution is possible along the lines indicated in your letter of September 9, 1965, to this committee. Under that proposal the Department would: (1) Classify approximately 30,000 acres of land as available for selection in redemption of scrip ranging in value from the average fair market value as prescribed in section 3(a) of the 1964 act to approximately 10 percent above that average value and (2) the average fair market value of lands to be made available under section 3(a) would be based on the conveyances made from August 5, 1955, to August 31, 1964. The legality of this procedure was approved by the Acting Solicitor in a memorandum of February 10, 1966, to the Under Secretary, a copy of which was furnished this Committee.

In view of the opinion by your Department that an administrative solution is feasible in connection with the satisfaction of scrip rights as expressed in H.R. 10193, this committee will take no further action on this proposal.

The Committee is deeply concerned over the moratorium and numerous delays involved in the satisfaction of outstanding scrip rights and requests that it be kept fully informed as to your plans and progress in implementing the administrative procedures referred to herein. In the event new or amended Departmental regulations or procedures are necessary, please advise this committee when they will be available.

Sincerely,

/s/ WAYNE N. ASPINALL,
Chairman.

Shortly thereafter the Department published proposed amendments to the pertinent regulation to implement its procedures for satisfaction of scrip, 31 F.R. 6985, May 12, 1966, which were adopted with minor amendments. Circular No. 2210, August 24, 1966 (31 F.R. 11178).

In pertinent part the regulation, 43 CFR 2221.07 classification provides:

* * * * *

(e) In satisfaction of applications filed on and after July 1, 1966, each claimant is entitled to receive land in tracts having a value per acre no less than the following:

(1) For soldiers' additional homestead, Isaac Crow and Merritt W. Blair claims, \$250;

* * * * *

(f) Hereafter, no tract of land will be classified as suitable for disposition in satisfaction for claims if the value per acre of the tract exceeds the following:

(1) For soldiers' additional homestead, Isaac Crow and Merritt W. Blair claims \$275; * * *

Thus, the Department after careful and extended examination of the issue and after full consultation with the interested committees of

the Congress has decided that it can legally, and as a matter of policy ought to, apply a maximum value factor in determining whether land is to be classified as suitable for satisfaction of scrip claims. The values set out in the regulation were determined in accordance with the terms of section 3(a) of the 1964 act.²

Mrs. Hamlin contends, however, that since her application was filed some two years before the act of August 31, 1964, was passed, it is not governed by the statute.

It is well established that the mere pendency of an application whose allowance is discretionary with the Secretary or where classification is a prerequisite to its allowance, as here, does not endow the applicant with rights that are immune to the terms of later statutory or regulatory requirements or conditions. *Joseph E. Hatch*, 55 I.D. 580 (1936); *Raymond L. Gunderson*, 71 I.D. 477, 480 (1964); cf. *Harold Ladd Pierce et al.*, 69 I.D. 14 (1962).

In accordance with this precept, the Under Secretary of the Interior issued Instructions date February 17, 1966, to the Director, Bureau of Land Management, on implementing the 1964 act, which directed that any scrip applications filed for land which had not been classified before August 31, 1964, as being suitable for disposition in satisfaction of scrip would be subject to the value criteria now found in the regulation (*supra*).

Accordingly, since the appellant has attempted to apply her soldiers' additional rights to land whose per acre value far exceeds that permitted by the pertinent regulation, it was subject to rejection and is rejected for that reason.

Therefore, the decision of the Bureau of Land Management is affirmed for the reasons given herein.

HARRY R. ANDERSON,
Assistant Secretary of the Interior.

² Sec. 3(a) (78 Stat. 751) provides:

"Prior to January 1, 1967, the Secretary shall classify, for conveyance and exchange for each type of claim recorded under the act of August 5, 1955, public lands in sufficient quantity so as to provide each holder of such a claim with a reasonable choice of public lands against which to satisfy his claim. The public lands so classified shall be of a value of not less than the average fair market value, determined by the Secretary as of the date patent issued, of those public lands actually conveyed in exchange for each type of claim since August 5, 1955."

The Department has also determined, as the correspondence quoted above states, that the period used in arriving at the average fair market value is to begin on August 5, 1955, and terminate on August 31, 1964, the date of the act.

**PROCEDURES INVOLVED WITH SUBMISSION AND APPROVAL OR
DISAPPROVAL OF WATER QUALITY STANDARDS***

Water Pollution Control: Water Quality Standards: Generally

Water Quality Act, October 2, 1965, 79 Stat. 903, which amends the Federal Water Pollution Control Act, July 9, 1956, 70 Stat. 498, as amended, 33 U.S.C. sec. 466 *et seq.*, provides a first option to the States to establish water quality standards prior to June 30, 1967.

Water Pollution Control: Water Quality Standards: Generally

After June 30, 1967, the States and the Secretary have authority to initiate action toward the establishment of water quality standards.

Water Pollution Control: Water Quality Standards: Generally

The Secretary, pursuant to section 10(c) (1) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. sec. 466g, has authority to determine that a portion of water quality standards established by a State meets the criteria of section 10(c) (3) of that Act, while determining the remainder of such water quality standards fail to meet such criteria.

June 26, 1967

M-36720

**TO: DIRECTOR, WATER QUALITY STANDARDS STAFF
OFFICE OF PROGRAM PLANS AND DEVELOPMENT FED-
ERAL WATER POLLUTION CONTROL ADMINISTRATION.
SUBJECT: PROCEDURES INVOLVED WITH SUBMISSION
AND APPROVAL OR DISAPPROVAL OF WATER QUALITY
STANDARDS.**

Your memorandum of May 2, 1967, requests our advice regarding procedural details concerning the adoption of water quality standards by the respective States, the submission of the standards to the appropriate Federal officials, and related questions regarding the operation of section 10 of the Federal Water Pollution Control Act, as amended (hereafter, "Federal Act"). Conforming to our earlier oral advices, we shall answer the ten questions in your request seriatim following a brief discussion of the applicable sections of the Federal Act.

SECTION 10(c) (1) of the Federal Act sets out the manner in which water quality standards shall become the standards "applicable to such interstate waters or portions thereof," if the criteria and plan of implementation and enforcement thereof are adopted by the respective States "in accordance with the letter of intent" referred to therein, and if the Secretary determines that such State criteria and plan are consistent with paragraph (3) of subsection (c).

SECTION 10(c) (2) provides the manner in which the Secretary may prepare regulations setting forth standards of water quality, and

*Not in Chronological Order.

promulgate them, if a State does not establish water quality standards pursuant to section 10(c)(1) of the Federal Act, or if the Secretary determines that the adopted State standards are not consistent with paragraph (3) of subsection (c), section 10. Under Question 6 we discuss the Secretary's approval under section 10(c)(2) of standards found by him to be consistent with section 10(c)(3), submitted by States after June 30, 1967.

The cited three subsections of the Federal Act are important for what they do not say, as well as what they do say, and we quote them here for your convenience:

Sec. 10(c)(1) If the Governor of a State or a State water pollution control agency files, within one year after the date of enactment of this subsection,¹ a letter of intent that such State, after public hearings, will before June 30, 1967, adopt (A) water quality criteria applicable to interstate waters or portions thereof within such State, and (B) a plan for the implementation and enforcement of the water quality criteria adopted, and if such criteria and plan are established in accordance with the letter of intent, and if the Secretary determines that such State criteria and plan are consistent with paragraph (3) of this subsection, such State criteria and plan shall thereafter be the water quality standards applicable to such interstate waters or portions thereof.

(2) If a State does not (A) file a letter of intent or (B) establish water quality standards in accordance with paragraph (1) of this subsection, or if the Secretary or the Governor of any State affected by water quality standards established pursuant to this subsection desires a revision in such standards, the Secretary may, after reasonable notice and a conference of representatives of appropriate Federal departments and agencies, interstate agencies, States, municipalities and industries involved, prepare regulations setting forth standards of water quality to be applicable to interstate waters or portions thereof. If, within six months from the date the Secretary publishes such regulations, the State has not adopted water quality standards found by the Secretary to be consistent with paragraph (3) of this subsection, or a petition for public hearing has not been filed under paragraph (4) of this subsection, the Secretary shall promulgate such standards.

(3) Standards of quality established pursuant to this subsection shall be such as to protect the public health or welfare, enhance the quality of water and serve the purposes of this Act. In establishing such standards the Secretary, the Hearing Board, or the appropriate State authority shall take into consideration their use and value for public water supplies, propagation of fish and wildlife, recreational purposes, and agricultural, industrial, and other legitimate uses.

The plan of the Federal Act is such as to give the respective States the first option for adopting standards, and upon their failure to do so as prescribed in the act, or if a revision of the established standards is desired, the Secretary may undertake to have standards promulgated by following the procedures prescribed in section 10(c)(2) and section 10(c)(4) of the Federal Act. With so much as an introduction, we pose your questions and our answers to them.

¹ This subsection added by section 5(a), 79 Stat. 907, approved 10/2/65.

June 26, 1967

1. Can either the Governor or the administrator of the appropriate water pollution control agency submit official water quality standards under the Federal Water Pollution Control Act, as amended?

The Federal Act does not specify who shall "submit" the standards adopted by the respective States, or to whom they shall be submitted. Administratively, the State standards may be submitted either by the Governor of the State or the designated official State agency to the Secretary or to the Commissioner.

2. Does it matter whether the standards are submitted directly to Secretary Udall, Commissioner Quigley or to a Federal Water Pollution Control Administration Regional Director?

This question has been answered under question 1 above.

3. What are the necessary ingredients of an official submission?

We believe that the submission of standards by each State on or before June 30 should include:

(a) The standards as adopted by the State. These would include a catalog of the interstate (including coastal) waters of the State, the uses of the waters, the water quality criteria employed by the State in the setting of standards, and the application of such criteria to the specific waters and their uses. These must be described in sufficient detail to allow the Secretary to ascertain whether the State standards will be consistent with section 10(c)(3) of the Federal Act.

(b) The plan of implementation and enforcement. These should be based on adequate legal authority under State law permitting the State agency a clear course of effective State action to enforce the adopted plans. The citation to this State law should be expressed as part of the plan of enforcement.

(c) Supporting documentary materials. The formal resolution of adoption by the appropriate State body and a statement by the State agency that the standards were adopted before June 30, 1967, after public hearings and in accord with the letter of intent. The statement should indicate that a transcript of the hearings is available.

4. Should the Secretary or Commissioner acknowledge the receipt of standards soon after they are submitted for review?

While this is normally a matter for administrative determination, we believe the Commissioner should acknowledge the receipt of standards soon after they are submitted for review.

5. Do you see anything inappropriate in our transmitting critiques of official standards to a State with our suggestions for modifications through the Regional Office without acknowledging the Secretary's participation? The reason for this procedure is to have the standards written in a form that is as acceptable as possible to Commissioner

Quigley before he transmits them with his recommendations to the Secretary.

The correction of minor and technical deficiencies, including such things as misspelled words, improper punctuation, etc., as well as establishing a uniform format acceptable to the Commissioner, can be accomplished by written exchanges without the necessity of any formal procedures. This can be done either before or after June 30, 1967.

We do not view as inappropriate the informal advices being rendered by Commissioner Quigley, before formal submission of the State's standards as to whether he would recommend to the Secretary certain elements within the standards either for approval or disapproval. It should be made clear that these critiques are being made without the Secretary's participation and are not to be taken as his expression on the matter.

Following the formal submission of the State's standards, if the standards are to be disapproved after June 30, 1967, in any substantive regard, we believe that such disapproval should be by Secretarial action. Such disapproval should be made by a Secretarial notice of disapproval, together with the reasons therefor, being forwarded to the affected State and, if deemed administratively desirable, a detailed critique may be included therewith. This notice of disapproval and critique may be such as to apply to all waters included in the submission or it may be such as to apply to only some of the rivers or bodies of waters, or portions of them, and as to some or all of the parameters established for the waters.

Approval of a State's standards as submitted will be made pursuant to section 10(c) by a notice of approval to the State, with a clear statement of the standards, or portions of them, being so approved. Approved standards and the plan of implementation and enforcement will thereupon become the standards applicable to the interstate waters or portions thereof. It is evident that a State may have approved "standards" and nonapproved "standards" at the same time, even on the same river basin, as you find certain parameters may be consistent with section 10(c) (3) while other parameters are not.

6. May water quality standards for interstate waters or portions thereof adopted by a State after June 30, 1967, be accepted by the Secretary as the Federal standards applicable to such waters provided he determines that such standards are consistent with section 10(c) (3) of the Federal Water Pollution Act?

In our opinion, legal authority may reasonably be found in sections 10(c) (1) and 10(c) (2) of the Federal Act, pursuant to which the Secretary may accept water quality standards which are adopted by a State after June 30, 1967, and if the Secretary determines that such standards are consistent with section 10(c) (3) of the Federal Act,

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those standards shall thereafter be the standards applicable to the waters for which established pursuant to the Federal Act.

As we understand sections 10(c) (1) and 10(c) (2) of the Federal Act, a scheme is provided whereby the water pollution control agencies of the States and the Federal Government are to contribute cooperatively to the fullest extent practicable in the creation of water quality standards which meet the criteria in section 10(c) (3) of the Federal Act, and which tend to accomplish the purposes of the act.

Pursuant to the statutory scheme, we look initially to the States for the establishment of water quality standards. Section 10(c) (1) provides for the establishment of such standards by States in accordance with the legal authority of such States. If States adopt standards prior to June 30, 1967, which the Secretary of the Interior determines are consistent with the criteria of section 10(c) (3) of the Federal Act, such standards are thereafter Federal standards applicable to waters for which established, and such standards may be enforced by Federal as well as State authority.

Section 10(c) (2) of the Federal Act provides the mechanism whereby the Federal Government, in the event of State failure or default, may establish water quality standards through the process of a conference followed by publication of and ultimately promulgation of water quality standards. The question then presented is whether the conference-publication technique is the only avenue available for establishing Federal standards under section 10(c) (2) of the Federal Act. If a State has failed to establish standards for its interstate waters or portions thereof prior to June 30, 1967, is a "10(c) (2) conference" necessary if standards are to be established under the Federal Act for such waters?

It is our opinion that section 10(c) (2) can reasonably be construed to provide an alternate device for the establishment of standards as follows. The last sentence of section 10(c) (2) provides:

* * * If, within six months from the date the Secretary publishes such regulations, the State has not adopted water quality standards found by the Secretary to be consistent with paragraph (3) of this subsection, or a petition for public hearing has not been filed under paragraph (4) of this subsection, the Secretary shall promulgate such standards.

It is clear that by this language Congress contemplated that the States would continue to establish standards after June 30, 1967, and it must then be determined whether the standard setting by the States pursuant to this last sentence of section 10(c) (2) is limited only to the six months following a 10(c) (2) publication. In our opinion, the time factor of six months after publication can reasonably be identified as a termination date of the Secretary's authority to accept as Federal

standards those which have been established by a State. The time when the Secretary's authority to accept State standards begins is not specified in section 10(c) (2). Such authority may be understood to have continued from its commencement in section 10(c) (1).

Under this view of sections 10(c) (1) and 10(c) (2), the States have exclusive authority to establish water quality standards until June 30, 1967. After that date and until six months following a 10(c) (2) Secretarial publication, the States and the Federal Government have concurrent authority to establish water quality standards. And six months after a 10(c) (2) publication, the Federal Government has exclusive authority to establish water quality standards. We think this is the statutory scheme of Federal-State cooperation which Congress intended and under which States will gain the maximum opportunity to establish their own water quality standards; the grant of maximum opportunity to the States is consistent with the declaration of policy in the Federal Act. Only when a State has failed to avail itself of its full opportunity is the Secretary called upon to initiate conference procedures to establish water quality standards. Under the foregoing view the Secretary is saved from the obligation of initiating numerous standard-setting conferences in those instances where a State is prepared to revise its water quality standards to meet any added specifications or changes the Secretary may ask. This approach will obviate an otherwise duplicative administrative procedure which might very well frustrate and thwart the purposes of the Water Quality Act of 1965.

There is the possibility that this interpretation of the statutory plan may not meet with a court's favor, and that the tribunal will view sections 10(c) (1) and 10(c) (2) contrary to the interpretation expressed above. In determining whether water quality standards have been established validly pursuant to the Federal Act, a court might adopt the more restrictive view that section 10(c) (2) of the Federal Act authorizes but one procedural route for establishing Federal standards, i.e., the conference, publication, promulgation technique.

However, bearing in mind the purposes of the Federal Act, the administrative realities of its administration, and the weight which courts are obliged to give to a reasonable interpretation of a statute by the officers or agencies charged with the administration of an act, on balance we are able to conclude that sections 10(c) (1) and 10(c) (2) may validly be interpreted to allow continued State-Federal negotiation following June 30 of this year, so that the States may adopt additions and modifications of their standards after June 30, 1967, and the State standards thus modified may continue to be accepted by the Secretary without the necessity of the conference, publication and promulgation set out in section 10(c) (2).

June 26, 1967

7. Can the Secretary approve a portion of a specific stream standard (e.g. the criteria) while rejecting another portion (e.g. the implementation plan)? Also, in a related question, can he approve standards from certain interstate waters within a State while disapproving others from the same State?

Section 10(c) (1) of the Federal Act does not direct the Secretary to approve or disapprove the State standards *in toto*. In the interest of efficiency, fairness, and going forward with as much of the State's work as possible, the Secretary should be particularly selective in his approval or disapproval of specific portions of the States' submitted standards.

Where, however, an integral part of the entire standards submission is lacking e.g., should there be *no* plan of implementation at all, or should the plan be entirely deficient—you would have no approvable "standards" as that word is used in section 10(c) (1) of the Federal Act.

As a matter of statutory law interpretation, the Federal Act should be read to carry out the intent of Congress in a reasonable and efficient manner. It should not be construed to require duplicative or needless acts to be performed; it should not be administered to cause doubt or misunderstanding as to the portions of submitted State standards to which the Secretary has no objection.

8. How uniform do standards have to be from contiguous States for shared waters (e.g. boundary rivers)?

Although Congress has directed only that the Secretary determine that the State criteria are to be consistent with section 10(c) (3), there are a number of indications in the Federal Act that the standards, where feasible, shall be compatible, on an interstate or contiguous State basis. The first sentence of section 10(c) (3) says that the standards of quality that will be established shall * * * serve the purposes of this act. Section 3(a) of the act says that the Secretary shall, in cooperation with other Federal agencies, with State water pollution control agencies and interstate agencies, and with the municipalities and industries involved, prepare and develop *comprehensive* programs for eliminating or reducing pollution of interstate waters and tributaries thereof. Section 3(a), in authorizing comprehensive programs for water pollution control, does so in terms of river basin pollution control plans, and as such encourages a regional rather than local approach. In addition, under section 4(a) the Secretary is directed to encourage cooperative activities by the States, uniform state laws relating to the prevention and control of water pollution, and the development of compacts between States for similar purposes. In our opinion, these sections of the law, as well as the practicality of describ-

ing waters which are essentially the same in a consistent manner, support the interpretation that the act is one by which Congress intended compatibility and consistency to be the rule as to streams and waters which are interstate boundary waters.

9. Legally, what procedures does the Secretary have to follow in responding to a State? For example, does he have to respond directly to the Governor?

There is no legal requirement with regard to responses by the Secretary to a State, and the normal Departmental procedures would apply.

10. Does a version of the standards have to be printed in the *Federal Register* or some other Government document? If so, can this be a condensed version? After all useful negotiation is ended, we have been thinking of summarizing the standards in chart form for ease of review by the Commissioner and the Secretary. This chart summary could be part of the *Federal Register* submission.

Your plan is to publish a version of each State's standards when in substantially final and acceptable form. Regardless of the legal requirements pertaining to the question, publication of the standards in a uniform textual arrangement in the *Federal Register* would be a convenience for all concerned, at all levels of endeavor and interest.

Section 10(c) (1) does not by its terms require State standards approved by the Secretary to be promulgated as regulations; Section 10(c) (2) requires the Secretary "to prepare regulations" where he desires a revision of a State's standards, or apparently, where he determines that the State criteria and plan are not consistent with section 10(c) (3). Therefore, you do have section 10(c) (2) publishing requirements in addition to those described immediately below.

Legal requirements for publishing certain materials in the *Federal Register* are specified in 80 Stat. 250 known as the "Public Information Act," as well as, for your specific purposes, section 10(c) (2) of the Federal Act. Public Information Act, dated July 4, 1966 provides:

Sec. 3(a) Publication in the *Federal Register*—Every agency shall separately state and currently publish in the *Federal Register* for the guidance of the public * * * (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and (E) every amendment, revision, or repeal of the foregoing. Except to the extent that a person has actual and timely notice of the terms thereof, no person shall in any manner be required to resort to, or be adversely affected by any matter required to be published in the *Federal Register* and not so published. For purposes of this subsection, matter which is reasonably available to the class of persons affected thereby shall be deemed published in the *Federal Register* when incorporated by reference therein with the approval of the Director of the *Federal Register*.

We believe that your plan to publish uniform condensations of the accepted standards will meet the requirements of this law in part only. You should include as part of each publication a "catch-all" statement to incorporate by reference the complete version of the

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standards, telling the public that they can be reviewed at the offices of the respective State water pollution control agency and the Regional Office of the F.W.P.C.A., as well as the Washington office of the F.W.P.C.A. In the interest of certain economies in publishing, the Director of the *Federal Register* should be pleased to approve your incorporation by reference.

If further assistance is required regarding these matters, please do not hesitate to call upon us.

THEODORE R. ROGOWSKI,
Assistant Solicitor.

J. M. JONES LUMBER COMPANY ET AL.

A-30761

Decided December 28, 1967

Accretion—Public Lands: Riparian Rights—Surveys of Public Lands: Generally

Where an island which was once public land owned by the United States is gradually eroded away in its entirety by the force of the river in which it lay and then fast land is formed on the site formerly occupied by the island by the process of accretion to a bank of the river which is privately owned, the United States can not assert title to such land as public land.

APPEAL FROM THE BUREAU OF LAND MANAGEMENT

The J. M. Jones Lumber Company and the Estate of R. Lee Parker, Jr., have appealed to the Secretary of the Interior from a letter decision by the Chief, Division of Engineering, Bureau of Land Management, dated November 14, 1966, stating that their protest against a resurvey and extension survey by the Bureau of section 30, T. 14 N., R. 1 E., Washington Meridian, Mississippi, had been dismissed upon acceptance of the plat of survey for the Director, Bureau of Land Management, on August 24, 1966. The decision further stated that, if no appeal to the Secretary were filed within 30 days, the plat would be officially filed and become the official record of survey.

The survey was authorized under special instructions, dated June 13, 1963, for the dependent resurvey and extension survey of Middle Palmyra Island, which comprises section 30, T. 14 N., R. 1 E., Washington Meridian. The appellants contend that the lands within the resurvey and extension survey are not Federally owned public lands, which there is authority to resurvey,¹ but, instead, that the disputed

¹ The purpose of a resurvey is to identify and segregate the public lands of the United States. It entails an investigation into factual matters and legal interpretations to determine whether the United States may properly claim land as public land and establish and re-establish boundaries. Approval of the survey and the official filing of the plat constitute an administrative determination that the lands so surveyed are public lands. See *Burt A. Wackerli et al.*, 73 I.D. 280, 286 (1966); cf. *Lane v. Darlington*, 249 U.S. 331 (1919). Such a determination, of course, does not have the effect of quieting title as does a proper court proceeding, and a resurvey cannot have the effect of divesting title from persons in whom title vested in accordance with an earlier survey. *Lane v. Darlington*, *supra*; *Kean v. Calumet Canal and Improvement Co.*, 190 U.S. 452, 461 (1903).

lands belong to them as accretions to lands shown on the original survey plat as uplands riparian to the Mississippi River.

Township 14 N., R. 1 E., Washington Meridian, Mississippi, was surveyed in 1830-31, with the survey plat approved in 1834.² This plat shows an area, which is described in subsequent plats, maps and charts as Davis Island, bounded on the north, west and south by the Mississippi River in a large horseshoe-shaped bend. Within the river channel are meandered three islands, with the two larger islands being subdivided into sections and the smaller island simply identified as section 30. In later plats and other documents these islands are identified as Upper Palmyra Island, a large island lying in the north-eastern portion of the river bend; Lower Palmyra Island (also listed as Hurricane Island on some of the documents in the record), a slightly smaller island lying in the westernmost part of the river bend opposite the southern half of Davis Island; and Middle Palmyra Island, a small island lying between these two islands in the north-western portion of the river bend. Middle Palmyra Island is shown on the plat as lying opposite areas of Davis Island designated as sections 9 and 10, with a tie to the meander corner on the east bank of the river between sections 9 and 10. The 1834 plat showed the acreage for sections 9 and 10 as 231.67 and 124.30 acres, respectively, and the acreage of Middle Palmyra Island (sec. 30) as 69.92 acres.

There has been considerable movement of the Mississippi River in this area during the past century and a half. Some of the changes have resulted in gradual shifts of the river's course from year to year, whereas other changes have resulted in a sudden change of the river's main channel to a new bed. Such an avulsive action in 1867 changed the main channel of the river to what is known as the Davis cut-off, which cut across the neck of the bend and caused the encirclement of the area known thereafter as Davis Island. Later changes sent the main flow of the river back around the Davis Island bend (also known as Hurricane Bend). However, at the time of the resurvey, and as far as we know now, the present main flow of the Mississippi River is east and south of the Davis Island area. The remainder of what was the river bend is now known as Palmyra Lake, a body of water much narrower than the former river channel. The medial line of this water way forms the boundary between the States of Louisiana and Mississippi, it having been established as such at the time of the Davis cut-off.

There is now land in the area shown on the 1834 survey plat as a river channel separating Middle Palmyra Island from the western shore of the mainland of Davis Island. There no longer appears an

² There was also an earlier survey of that township which it is unnecessary to discuss.

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island formation. This land area extends over the geographical area of Middle Palmyra Island as shown on the 1834 plat and continues westward beyond the island a considerable distance to the present water line of Palmyra Lake.

The land status records of this Department show that section 30, Middle Palmyra Island, has never been patented or title to it otherwise relinquished by the United States, but that it was withdrawn by Public Land Order No. 2709, June 20, 1962, for the Davis Island National Wildlife Refuge.³ The resurvey was ordered upon the request of the Bureau of Sport Fisheries and Wildlife to determine the public lands in the refuge. Sections 9 and 10 shown on the 1834 plat as uplands on Davis Island opposite Middle Palmyra Island have been patented by the United States.⁴

The dependent resurvey and extension survey was conducted from June 24, 1963, to July 6, 1965, and the plat of this survey was accepted for the Director on August 24, 1966. The field notes of this resurvey indicate that subsequent to the survey conducted in 1830, Middle Palmyra Island was washed away and ceased to exist as an island in place, that thereafter gradual accretions to sections 9 and 10 extending westward occupied the geographic position of the island and extended beyond to the present southeast bank of Palmyra Lake, and that title to the surveyed island as public land was reinstated upon its reappearance. The field notes and the plat show that the original meander line along the side of the island opposite sections 9 and 10 was reestablished as a fixed and limiting boundary separating the public land of the reestablished island from the lands accreted to patented sections 9 and 10. After establishing northern and southern meander points for the island's record position, the survey was extended to include the area accreted to the west of the island from lines normal to the present bank of Palmyra Lake. The total acreage for the resurveyed and extended area is given as 399.77 acres. All of this area is claimed by the appellants as lands accreted to sections 9 and 10 and other adjoining sections.

There is no disagreement as to the essential facts in this case, *i.e.*, that Middle Palmyra Island had gradually eroded away sometime prior to 1862, and that land had accreted to the uplands on the east bank of the river extending westward to and over the record position of the island and beyond westerly to the present bank of Palmyra Lake. The difference between the Bureau's position and that of the appellants has been in interpreting the law applicable to this factual

³ The status records also show that an oil and gas lease, Bureau of Land Management 046411, for section 30 was issued effective May 1, 1958, and extended to April 30, 1968.

⁴ The records show a patent for section 9, dated September 4, 1824, and a patent dated June 28, 1831, for section 10.

situation. In reaching the legal conclusion that upon formation of the new land within the area of the original survey of Middle Palmyra Island, title to the land belonged to the United States, the Chief, Division of Engineering, in his letter of February 18, 1965, to appellants, relied on an opinion, dated February 4, 1965, by the Associate Solicitor for Public Lands. This opinion based its conclusion on cases discussing the so-called rule of "submergence and reappearance of land" to the effect that where land once riparian has been completely eroded away but by subsequent action of the river it is restored or reappears by accretion or reliction, title of the former owner reattaches to the land thus reappearing, citing *Towl et al. v. Kelly and Blankenship*, 54 I.D. 455 (1934); *Herron v. Choctaw and Chickasaw Nations*, 228 F. 2d 830 (10th Cir. 1956); *Elliot v. Atlantic City*, 149 Fed. 849, 853 (C.C. D. N.J. 1907); *Stockley v. Cissna*, 119 Fed. 812, 831 (6th Cir. 1902); *Widdicombe v. Rosemiller*, 118 Fed. 295, 299-300 (C.C. W.D. Mo. 1902).

In their appeal appellants dispute this legal conclusion. Briefly, their contentions may be summarized as follows: First, they contend that the survey is contrary to the facts which show that the island was completely eroded away and the land extending over the former boundaries formed as accretions from the mainland. Second, they contend that the survey is contrary to the law for several reasons. They suggest, first of all, that the doctrine of reappearance of submerged land is not applicable here because under the old common law ruling as discussed by the Supreme Court in *Arkansas v. Tennessee*, 246 U.S. 158, 174 (1918), there must be reasonable marks to continue notice of the lands or if the marks be removed land must be identifiable. They contend that neither of these criteria is applicable here since the island completely disappeared by erosion and it is not capable of identification as the character of the land has been changed from an island formation to land accreted to the upland. Appellants also contend that State law controls here rather than Federal law in determining the title to lands lost by erosion and title to accretions. They assert that the "law of accretions" governs here to the effect that riparian owners lose land by erosion and gain title to land by accretion and that this rule is followed without dissent in this country. They state that it is the law of the State of Mississippi that the title to the bed of the Mississippi River belongs to the riparian proprietor to the thread of the stream unless restricted by the grant, and that the riparian proprietor is entitled to the accretions of his riparian lands. Appellants also suggest that the court cases cited by the Bureau, mentioned above, are distinguishable and involve the application of the doctrine of submergence and reappearance of land where there is avulsive action of the waters, rather than erosion and accretion, as is the case here, and that

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they also involved jurisdictions which hold that private ownership of lands extends only to the high water mark, or to the ordinary high water mark, or to the space between the high water and low water marks, or to the space between the ordinary high water and low water marks, and not to the thread (or thalweg or center) of the navigable river.

Finally, appellants contend that, even if the survey is not contrary to the facts and law, it is in error in that it encroaches upon the riparian rights of the owners of sections 8, 9, 10 and 11 of T. 14 N., R. 1 E. They request that this Department either withdraw the claim to the land (*i.e.*, the survey), or file a suit to have title to the land judicially determined.

The real question posed by this appeal is whether or not the law is so clear with respect to the facts of this case that the United States should refrain from asserting any claim of title to the lands in dispute. The position of the appellants basically is that the United States lost title once the island was submerged and never regained title to any land reappearing within the former boundaries of the island as such land belongs to them as accretions to their lands. The position of the Bureau is that the United States did regain title to the lands once they reappeared.

As we have seen, the opinion on which the Chief, Division of Engineering, relied described the situation of land which has been submerged and then restored as "reappearance" and apparently considered all situations in which lands reappear to be governed by the same rules.

As we read the cases, we find that land can disappear and reappear in a variety of factual situations with the consequences varying with the facts.

The most ordinary situation is one in which land in a riparian lot is partly eroded away and then restored by accretion but the accretion does not extend beyond the former river bed. In another situation a riparian lot is eroded completely away so that adjoining land once remote from the water becomes riparian, and then by accretion the eroded lot is restored in whole or in part so that the adjoining land is again remote. In a third variation accretion builds on a riparian lot on one bank to such an extent that it reaches across the whole of the former river bed and covers the position of land which was originally on the opposite bank but which has been washed away. And, finally, for our purposes here an island may be eroded completely away and then reappear in its former position.

The generally stated and accepted rule governing the rights of riparian owners to whose land accretion attaches is that the added

land belongs to the riparian owner. *Jefferis v. East Omaha Land Co.*, 134 U.S. 178 (1890). This rule applies to our first example.

In the second variation, in which the river erodes away a riparian lot to such an extent that a remote lot becomes riparian and then accretion builds up from the formerly remote lot so that not only is it restored to its former boundary but the eroded riparian lot is also recreated in part, in whole, or even beyond its original riparian boundary, the courts are divided as to whether the accretion belongs to the owner of the remote lot in total or only to his original boundary with the rest going to the original riparian owner. Compare *Perry v. Erling*, 132 N.W. 2d 889 (Sup. Ct. N.D. 1965); and *Greeman v. Smith*, 138 N.W. 2d 443 (Sup. Ct. N.D. 1965); with *Cunningham v. Prevow*, 192 S.W. 2d 338, 350 (Ct. App. Tenn. 1945). The Department has held that in such circumstances the originally remote owner can acquire title only up to the limits of his original surveyed boundaries. *Towl et al. v. Kelly and Blankenship*, *supra*.

The third situation has been before the Department several times in recent years. In each case it has been held that land formed by accretion to one bank of a river belongs to the owner of that bank even though the accretion is so extensive that it covers an area which was formerly fast land on the other side of the river but which was eroded away. *Edwin J. Keyser*, 61 I.D. 327 (1954), and cases cited in footnote 1 of that decision; *Henry E. Schemmel et al.*, A-29906 (February 20, 1964). As the *Keyser* case noted, all the courts which have dealt with the problem have reached the same result. A recent case held that a tract of land measuring several thousand feet added by accretion to a lot on the north bank of the Colorado River belonged to the owner of that lot even when the accretion came to occupy land in the same physical location as land patented to another on the original south bank of the river. *Beaver v. United States*, 350 F. 2d 4, 11 (9th Cir. 1965), *cert. denied* 383 U.S. 937 (1966).

In another recent case in which the movement of the Arkansas River was quite similar to that of the Mississippi here, the north bank of the river migrated southward from sections 17 and 18, T. 7 S., R. 4 W., Arkansas, to a position in sections 2, 3, 4, and 5 in T. 8 S., R. 4 W., forming a huge bend. The river then cut across the neck of the bend leaving an ox-bow lake on the periphery of the bend. The area in dispute covered 800 acres formerly contained in sections 33, 34, and 35, T. 7 S., R. 4 W., and in sections 2, 3, and 4, T. 8 S., R. 4 W.—which had originally been on the south bank of the river. The accretion added some three miles to the lots riparian to the north bank. The court found that the river migrated southward by the process of accretion and awarded the land in dispute to the plaintiff whose claim was based on ownership of a portion of sections 7, 17, and

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18, T. 7 S., R. 4 W. *Matthews v. McGee*, 358 F. 2d 516 (8th Cir. 1966).

Here again the court followed accretion into the physical site of land on the opposite bank, and, despite the ease with which the former land could be identified and its boundaries restored, it recognized the right of a riparian owner to the accretions to his land, even to this great extent.

There remains the problem of the disappearing and reappearing island. While there do not appear to be any cases in which the facts were so limited, there are dicta supporting the view that the original owner regains title to a reappearing island if it reappears as an island in its original location. *Widdicombe v. Rosemiller, supra*; *St. Louis v. Rutz*, 138 U.S. 226, 249 (1891); *Van Deventer v. Lott*, 180 Fed. 378, 382 (2d Cir. 1910).

We are concerned, however, not with an island that arises anew as an island, but a land mass that grows by accretion from a bank opposite the island until it covers the site the island formerly held and substantially more. This is not a situation of simple accretion without an invasion of former fast land, nor is it the case of riparian land being washed away and then reappearing on its own side of the river; nor is it an island that is resurrected as an island. It is, in all pertinent factors, a case of accretion to one bank extending across a river bed until it covers land formerly within the physical location of land on the opposite bank.

The only complicating, and to some extent confusing variation, is that the physical site of the reappearing land was once an island instead of the opposite bank. But there does not seem to be any reason why accretion invading the site of a former island should be governed by a rule different from that applicable to the opposite bank of a river. An island is governed by the same rules of accretion as land bounded on one side only by water, that is, the boundaries are presumed to vary with any gradual change in the line between land and water, "or, as it is otherwise expressed, the owner of an island is entitled to land added thereto by accretion to the same extent as the owner of land on the bank or shore of the mainland." 3 Tiffany, Real Property, sec. 1228 (3d ed. 1939).

A striking example of the application of the regular rules of accretion to an island is found in *Widdicombe v. Rosemiller, supra*, in which after discussing the law governing a reappearing island the court found that the island had not been entirely washed away and that a body of land from 15 to 20 acres formed the nucleus to which there was built on by accretion not only an area equal to the original surveyed area but, extending laterally beyond the survey lines, a sub-

stantially greater area (p. 301). The court awarded to the island the land accreting to it to the west across a channel of some 200 yards to the point where it met accretion from the mainland. It also held that the island gained by accretion eastward, the direction of the major accretion, all of a bend measuring one and a half miles that lay directly east of it. The island on survey contained 48.62 acres while the bend formed by accretion covered 1100 acres, a substantial portion of which went to the island.⁵

In a recent case a Federal district court applied the North Dakota law to an identical factual situation and held that where an island has been completely eroded and washed away and later land is formed by accretion to riparian lots on the river bank to such an extent that land appears again in the physical location formerly occupied by the island the title to the land goes to the owner of the riparian lot and not to the owner of the island. *United States v. 2,134.46 Acres of Land, etc.*, 257 F. Supp. 723 (D.C.N.D. 1966).

If we treat the situation then as one in which accretion to one bank of a river advances across the original river bed until land appears within the physical site of land formerly on the opposite bank of the river, we must conclude that the United States has no title to any of the accretion based solely on its ownership of the former island.

The doctrine of reappearance is, we believe, not helpful here. In a recent case, the Ninth Circuit dealt with the issue of accretion and the doctrine of reappearance. *Beaver v. United States, supra*. The facts show that the Colorado River, which in the area in question flows generally from east to west, had in the course of some forty years moved several thousand feet to the south so that a tract of land formerly on the south shore of the river was now on the north. The United States claimed this tract as accretion to land it owned which was originally riparian land on the north shore. After holding that the land was formed by accretion, the court held that the case was governed by the ordinary rules of accretion and that the doctrine of "re-emergence" was not pertinent. The court said:

As an alternative theory of recovery, appellants raised a title claim under the doctrine of re-emergence. That doctrine rests upon "easy identification" of riparian land "lost" and "found" again by re-emergence from the stream bed. These elements are not here present.

We agree with the government:

"That doctrine has been applied by some state courts as an exception to the doctrine of accretion, but not in a factual situation such as is present in this case. In order for the doctrine to be applied in those states that recognize it, two things must occur: First, the water-course must move across and submerge riparian land so that land formerly nonriparian is made riparian; then the

⁵ While there is no discussion of the point in the case, it seems as though the land accreting to the island and adjacent mainland must have extended to the eastward sufficiently to invade the position of land formerly on the east bank of the river.

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watercourse must return to or near its original bed so that the riparian land that had been submerged is uncovered, or re-emerges.

* * * * *

"The United States' land to which the tract has accreted was riparian originally and one of the reasons for the doctrine of accretion is to allow that land to remain riparian. *Philadelphia Co. v. Stimson*, 223 U.S. 605, 624 [32 S.Ct. 340, 56 L.Ed. 570] (1912). Appellants here seek to apply the "re-emergence" doctrine to render nonriparian land that was originally riparian. This is directly contrary to the purposes of the exception.

* * * * *

"*Stone v. McFarlin*, 249 F. 2d 54, 55-57 (C.A. 10, 1957), *cert. den.*, 355 U.S. 955 [78 S.Ct. 540, 2 L.Ed. 2d 531] * * * *Anderson-Tully Co. v. Tingle*, 166 F. 2d 224 (C.A. 5, 1948), *cert. den.*, 335 U.S. 816 [69 S.Ct. 36, 93 L.Ed. 371], where the court stated (pp. 228-29): 'Where a river is a boundary and there is no avulsion, a land-owner can never cross the river to claim an accretion on the other side' (Appellee's Brief, pp. 15-17.). 350 F. 2d at 11.

There is nothing in the Mississippi cases indicating that the regular rule of accretion would not apply to unusually large increments of land to one bank of a river. In several cases the court apparently assumed the regular rule to be controlling although the accreted area attained a depth of a mile. *United States Gypsum Co. v. Reynolds*, 18 So. 2d 448 (Sup.Ct. Miss. 1944); *Sharp v. Learned*, 14 So. 2d 218 (S.Ct. Miss. 1943).

So here we must conclude that the doctrine of "reappearance" or "re-emergence" cannot apply to cut off the rights of a riparian owner to accretion attaching to his land in favor of a riparian owner on an opposite bank whether it be the land of the other shore or of an island.

Therefore, pursuant to the authority delegated to the Solicitor by the Secretary of the Interior (210 DM 2.2A(4)(a); 24 F.R. 1348), it is concluded that upon the basis of the facts presented in this appeal, the United States has no basis for a claim to title to the land here in dispute, the decision of November 14, 1966, is reversed, and the case is remanded for further proceedings consistent herewith.

EDWARD WEINBERG,
Deputy Solicitor.

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2. Where the requirements for a class 1 color of title claim have been met as to a tract of land and the United States, on the mistaken assumption that the tract is privately owned, takes and floods a portion of the tract which contains all the required improvements or cultivation, the class 1 claim is not lost as to the remaining portion of the land which is neither improved nor cultivated... 214

CONFIDENTIAL INFORMATION

1. Although reports by Departmental personnel on their examinations of mining claims are generally considered as confidential intra-departmental communications which are not to be made available to mining claimants, disclosure of the factual information in such reports will be permitted..... 161

CONSTITUTIONAL LAW

1. A Congressional directive for the review by the Secretary of the Interior of areas with wilderness characteristics within a 10-year period affects neither the Executive's authority to make recommendations nor the authority of Congress to enact legislation, should the specified time period not be complied with..... 97

CONTRACTS

CONSTRUCTION AND OPERATION

Actions of Parties

1. Where in a motion for reconsideration the appellant questions the Board's finding that a substantial portion of a claim for rock excavation represents work performed below subgrade for which the contract provides no basis for reimbursement but fails to show that the contracting officer or the Government engineering personnel concerned were involved in any way in the appellant's decision to proceed with the subgrade excavation, the Board's earlier decision that the work so performed was voluntary and not of the character for which the Government is liable is affirmed..... 106
2. Under a contract for construction of a Visitor Center including a Rotunda and office wing, containing a special clause for precedence of work on the Rotunda over the work in other areas "if at all possible," but without otherwise requiring any order of sequence of the work, where the work on the Rotunda was delayed during investigation of foundation conditions in the Rotunda area, and where in the meantime the contractor was directed to proceed with work on the office wing but failed to do so until it was able to commence work on the Rotunda, and after which time the contractor worked concurrently in both areas, the actions of the parties and the interpretation of the contract as a whole do not support a claim for additional compensation based on an alleged change in the sequence of the contractor's operations..... 305

CONTRACTS—Continued

CONSTRUCTION AND OPERATION—Continued

Buy American Act

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1. All territories and possessions, including Guam, are considered locations of domestic sources of supply under the Buy American Act; but Guam is not limited to domestic sources in its purchases for use on Guam because under the rule of statutory construction *expressio unius est exclusio alterius*, it may be concluded that Congress intended to exclude Guam from the enumerated entities whose purchases for use or for construction within their boundaries would be limited to domestic sources-----

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Changed Conditions

1. Under a contract for demolition of masonry, excavation, and building a structural shell at the base of the Statue of Liberty, where the specifications contained a general requirement for underpinning of existing structures adjoining new work, and where the contractor, from a site inspection and pre-bid discussions, was aware of the possibility that such underpinning would be required to support the foundation of a perimeter wall, the depth of which was not shown in the drawings and was not known by the Government, the contractor's claim that upon excavation it found that underpinning was necessary and that the expense of underpinning such wall should be paid as a changed condition is denied for lack of proof that the wall's foundation was unusually shallow or abnormally constructed-----
2. Under a contract providing for extra compensation for excavation of rock, which contained definitions of solid rock, ledges, and boulders, where the contractor encountered a changed condition consisting of many boulders of sizes exceeding those represented by the contract, the contractor is not entitled to an equitable adjustment on the basis that such boulders constituted solid rock, in the absence of timely notice to the contracting officer of the condition so that appropriate corrective measures could be considered; and in absence of a preponderance of evidence supporting the contractor's claim, the equitable adjustment allowed by the contracting officer's findings with respect to the volumes of boulders excavated will be affirmed and the appeal denied-----
3. Under a contract for the construction of a road requiring the use of a soft type of rock known as oolite, to be obtained from adjacent borrow areas, and where no subsurface investigations had been conducted by the Government to determine the availability of oolite in sufficient quantities, the contractor was entitled to rely upon the representations in the contract with respect to the presence of sufficient oolite materials. Upon excavation of borrow pits designated by the Government when the contractor encountered much harder rock that was difficult to excavate and crush, and little if any oolite material, the condition so encountered was a changed condition of the first category within the meaning of Clause 4 of Standard Form 23A. The direction by the contracting officer that the hard rock be utilized for constructing the road was a constructive change and the contractor is entitled to an equitable adjustment upon either theory, whether a changed condition was encountered or a constructive change was made-----

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CONTRACTS—Continued

CONSTRUCTION AND OPERATION—Continued

Changed Conditions—Continued

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4. Under a contract requiring *inter alia*, excavation in canyons in the Rocky Mountain area of Western Colorado and installation of steel siphon pipes and other structures for an irrigation canal project, where the contract, the logs of borings and other Government data provided only general information concerning subsurface conditions that might be encountered, and then only as to areas outside of and not as deep as the required excavations in most of the canyon areas, the Board found that such information could not reasonably have been viewed as representations respecting the quantities or percentages of cobbles and boulders that would be encountered in such excavations in the consideration of a first category changed conditions claim. Where excavations were required for structures along the canal, the conditions encountered did not differ significantly from those shown on the applicable logs----- 253
5. Where a construction contractor assigned several employees to make a pre-bid site investigation that extended over several days, and those employees in a careful examination of the project area would have seen that there were many basalt cobbles and boulders at numerous points on or near the canal alignment, the contractor must be charged with the duty of obtaining rudimentary knowledge concerning the geologic origin of such cobbles and boulders and how they came to be mixed in with nonbasaltic materials, and about the proportions of cobbles and boulders that might be encountered along the benches and in the canyons where work on the canal was to proceed. The failure to secure information about the origin of materials in certain of the canyons was held by the Board not to be justified in the circumstances of the case; hence, there was a failure of proof of second category changed conditions. Except for a portion of one siphon site, "unanticipated" (second category) changed conditions were found not to have been encountered on the project because the percentages of cobbles and boulders were not shown to have been unusually high, or materially different from those ordinarily found in the area in work of the kind required under the contract, and because most of the appellant's difficulties arose from its own inefficient or unskilled construction methods----- 253
6. Under a contract modification agreement for equitable adjustment purporting to settle and release claims presented by the contractor as additional expenses of coping with conditions encountered in constructing foundations of a building, an appeal based on the allegation that the contractor is entitled to additional compensation, for the reason that the conditions so encountered were alleged to be changed conditions, will be dismissed, since the Board has no authority to reform a contract----- 305

Changes and Extras

1. Under a contract providing for estimated quantities and unit prices, and stating that increases or decreases in such quantities are to be paid for only at such unit prices, the contractor is entitled to

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| an equitable adjustment for additional quantities performed pursuant to a change order necessitating the duplication of supplemental work that had been completed previously and was not contemplated by the unit prices----- | 28 |
| 2. Where in a motion for reconsideration the appellant questions the Board's finding that a substantial portion of a claim for rock excavation represents work performed below subgrade for which the contract provides no basis for reimbursement but fails to show that the contracting officer or the Government engineering personnel concerned were involved in any way in the appellant's decision to proceed with the subgrade excavation, the Board's earlier decision that the work so performed was voluntary and not of the character for which the Government is liable is affirmed----- | 106 |
| 3. Under a tunnel construction contract that authorized the use of channel lagging between steel arches (to perform the necessary function of supporting the sides and roof of the tunnel), where a change was ordered in the contractor's proposed conventional method of attaching the channel steel lagging, which change required the cutting of notches in the channels and reversing the lagging so that the pieces of lagging were fitted (in part) between the steel arches, resulting in a technical restriction of excavation and concrete "pay" lines, the equitable adjustment contemplated by the standard form of Changes Clause should not be limited to the expense of cutting the notches but also should provide reasonable settlement for costs that the contractor had included in its bid on the assumption that the conventional lagging method and associated wider pay lines would be acceptable on the project----- | 152 |
| 4. Under a contract for the construction of a road requiring the use of a soft type of rock known as oolite, to be obtained from adjacent borrow areas, and where no subsurface investigations had been conducted by the Government to determine the availability of oolite in sufficient quantities, the contractor was entitled to rely upon the representations in the contract with respect to the presence of sufficient oolite materials. Upon excavation of borrow pits designated by the Government when the contractor encountered much harder rock that was difficult to excavate and crush, and little if any oolite material, the condition so encountered was a changed condition of the first category within the meaning of Clause 4 of Standard Form 23A. The direction by the contracting officer that the hard rock be utilized for constructing the road was a constructive change and the contractor is entitled to an equitable adjustment upon either theory, whether a changed condition was encountered or a constructive change was made----- | 218 |
| 5. Directions by the contracting officer for the use of alternative construction practices or procedures that were specifically provided for in the contract did not constitute a constructive change. At the time the work was performed the contractor accepted such practices or procedures without contending that excess costs would | |

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be involved. The Board concluded that this indicated that utilization of the alternatives to meet conditions encountered on a canal project more than fifteen miles in length over ridges, benches, canyons and other varying features of the terrain was a matter that had been expected by both parties, rather than work of a different character than that required by the original terms of the contract.....

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6. Under a contract for construction of a Visitor Center including a Rotunda and office wing, containing a special clause for precedence of work on the Rotunda over the work in other areas "if at all possible," but without otherwise requiring any order of sequence of the work, where the work on the Rotunda was delayed during investigation of foundation conditions in the Rotunda area, and where in the meantime the contractor was directed to proceed with work on the office wing but failed to do so until it was able to commence work on the Rotunda, and after which time the contractor worked concurrently in both areas, the actions of the parties and the interpretation of the contract as a whole do not support a claim for additional compensation based on an alleged change in the sequence of the contractor's operations.....

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Drawings and Specifications

1. Under a contract for demolition of masonry, excavation, and building a structural shell at the base of the Statue of Liberty, where the specifications contained a general requirement for underpinning of existing structures adjoining new work, and where the contractor, from a site inspection and pre-bid discussions, was aware of the possibility that such underpinning would be required to support the foundation of a perimeter wall, the depth of which was not shown in the drawings and was not known by the Government, the contractor's claim that upon excavation it found that underpinning was necessary and that the expense of underpinning such wall should be paid as a changed condition is denied for lack of proof that the wall's foundation was unusually shallow or abnormally constructed.....
2. A contractor is not entitled to an equitable adjustment under a claim of extra work for installing concrete ballast pads on top of underground tanks where the drawings clearly require such ballast pads to be included as part of the installation of the tanks, and such ballast pads are not referred to in any other separate pay item for concrete work, such as claimed by the contractor with respect to thrust blocks, anchor blocks, bearing pads and outfall pads.....
3. Where delays occur in the performance of the contractor's work pending decisions by the Government on questions concerning drawings and specifications, due to alleged lack of Government supervision, or because of the actions of other contractors, an appeal based on such claims will be dismissed as being outside the Board's jurisdiction, in the absence of a contract provision of the "pay for delay" type.....

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1. Under a contract requiring construction at an early stage of soil bearing footings for the walls of a structure, where a large part of the work is suspended by the Government for more than five months pending redesign of such footings due to unstable soil conditions, and the contractor is thereby prevented for an unreasonable period of time from performing a substantial portion of the work concurrently with its other operations under the contract and where the Board concludes that the unreasonable portion of such suspension had the effect of extending the period required for completion of the contract for a period of nine weeks, the contractor is entitled to an equitable adjustment pursuant to the standard "Suspension of Work" clause.-----

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Estimated Quantities

1. Under a contract providing for estimated quantities and unit prices, and stating that increases or decreases in such quantities are to be paid for only at such unit prices, the contractor is entitled to an equitable adjustment for additional quantities performed pursuant to a change order necessitating the duplication of supplemental work that had been completed previously and was not contemplated by the unit prices.-----

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General Rules of Construction

1. Under a contract for construction of a Visitor Center including a Rotunda and office wing, containing a special clause for precedence of work on the Rotunda over the work in other areas "if at all possible," but without otherwise requiring any order of sequence of the work, where the work on the Rotunda was delayed during investigation of foundation conditions in the Rotunda area, and where in the meantime the contractor was directed to proceed with work on the office wing but failed to do so until it was able to commence work on the Rotunda, and after which time the contractor worked concurrently in both areas, the actions of the parties and the interpretation of the contract as a whole do not support a claim for additional compensation based on an alleged change in the sequence of the contractor's operations.-----

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Intent of Parties

1. Where a general release executed on settlement of amounts due under a contract contains exceptions as to certain pending claims but fails to reserve a claim previously made, because of alleged inadvertence on the part of the contractor, such omission precludes consideration of the merits of the claim by the Board and requires its dismissal as being outside of the Board's jurisdiction.-----

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Modification of Contracts

1. Under a contract modification agreement for equitable adjustment purporting to settle and release claims presented by the contractor as additional expenses of coping with conditions encountered in constructing foundations of a building, an appeal based on the allegation that the contractor is entitled to additional compensation, for the reason that the conditions so encountered were alleged to be changed conditions, will be dismissed, since the Board has no authority to reform a contract.-----

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CONTRACTS—Continued

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Notices

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1. Under a contract providing for extra compensation for excavation of rock, which contained definitions of solid rock, ledges, and boulders, where the contractor encountered a changed condition consisting of many boulders of sizes exceeding those represented by the contract, the contractor is not entitled to an equitable adjustment on the basis that such boulders constituted solid rock, in the absence of timely notice to the contracting officer of the condition so that appropriate corrective measures could be considered; and in absence of a preponderance of evidence supporting the contractor's claim, the equitable adjustment allowed by the contracting officer's findings with respect to the volumes of boulders excavated will be affirmed and the appeal denied..... 86
2. A claim for additional compensation based on alleged unreasonable delay by the Government in issuing a notice to proceed will be dismissed as being outside the jurisdiction of the Board..... 305

Payments

1. Under a contract for clearing logs and other debris from a creek, where the contractor was permitted to remove merchantable logs so cleared and to dispose of them for its own account, in lieu of burning as required by the contract, and where in addition the contractor cut and removed other merchantable standing or fallen trees outside of the work area, the Government was entitled by virtue of the contract provisions concerning the contractor's responsibility for property to deduct as a set-off from contract payments due to the contractor, treble damages pursuant to the applicable statutes of the State of Oregon with respect to the value of the illegally removed timber..... 70

Third Persons

1. A motion by appellant for an order directing the Government to produce for inspection and copying, documents relating to the drafting, approval and promulgation of certain regulations will be denied without prejudice to its later renewal where it appears that the appellant has not taken advantage of inspection and copying rights accorded by the Government bodies in possession of such documents, in accordance with the regulations of those agencies 157

DISPUTES AND REMEDIES

Generally

1. A motion by appellant for an order directing the Government to produce for inspection and copying, documents relating to the drafting, approval and promulgation of certain regulations will be denied without prejudice to its later renewal where it appears that the appellant has not taken advantage of inspection and copying rights accorded by the Government bodies in possession of such documents, in accordance with the regulations of those agencies 157

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Burden of Proof

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1. Under a contract for demolition of masonry, excavation, and building a structural shell at the base of the Statue of Liberty, where the specifications contained a general requirement for underpinning of existing structures adjoining new work, and where the contractor, from a site inspection and pre-bid discussions, was aware of the possibility that such underpinning would be required to support the foundation of a perimeter wall, the depth of which was not shown in the drawings and was not known by the Government, the contractor's claim that upon excavation it found that underpinning was necessary and that the expense of underpinning such wall should be paid as a changed condition is denied for lack of proof that the wall's foundation was unusually shallow or abnormally constructed.----- 35
2. Under a contract providing for extra compensation for excavation of rock, which contained definitions of solid rock, ledges, and boulders, where the contractor encountered a changed condition consisting of many boulders of sizes exceeding those represented by the contract, the contractor is not entitled to an equitable adjustment on the basis that such boulders constituted solid rock, in the absence of timely notice to the contracting officer of the condition so that appropriate corrective measures could be considered; and in absence of a preponderance of evidence supporting the contractor's claim, the equitable adjustment allowed by the contracting officer's findings with respect to the volumes of boulders excavated will be affirmed and the appeal denied.----- 86
3. Under a contract requiring *inter alia*, excavation in canyons in the Rocky Mountain area of Western Colorado and installation of steel siphon pipes and other structures for an irrigation canal project, where the contract, the logs of borings and other Government data provided only general information concerning subsurface conditions that might be encountered, and then only as to areas outside of and not as deep as the required excavations in most of the canyon areas, the Board found that such information could not reasonably have been viewed as representations respecting the quantities or percentages of cobbles and boulders that would be encountered in such excavations in the consideration of a first category changed conditions claim. Where excavations were required for structures along the canal, the conditions encountered did not differ significantly from those shown on the applicable logs.----- 253
4. Where a construction contractor assigned several employees to make a pre-bid site investigation that extended over several days, and those employees in a careful examination of the project area would have seen that there were many basalt cobbles and boulders at numerous points on or near the canal alignment, the contractor must be charged with the duty of obtaining rudimentary knowledge concerning the geologic origin of such cobbles and boulders and how they came to be mixed in with nonbasaltic materials, and about the proportions of cobbles and boulders that might be en-

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DISPUTES AND REMEDIES—Continued

Burden of Proof—Continued

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countered along the benches and in the canyons where work on the canal was to proceed. The failure to secure information about the origin of materials in certain of the canyons was held by the Board not to be justified in the circumstances of the case; hence, there was a failure of proof of second category changed conditions. Except for a portion of one siphon site, "unanticipated" (second category) changed conditions were found not to have been encountered on the project because the percentages of cobbles and boulders were not shown to have been unusually high, or materially different from those ordinarily found in the area in work of the kind required under the contract, and because most of the appellant's difficulties arose from its own inefficient or unskilled construction methods.....

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DAMAGES

Measurement

1. Under a contract for clearing logs and other debris from a creek, where the contractor was permitted to remove merchantable logs so cleared and to dispose of them for its own account, in lieu of burning as required by the contract, and where in addition the contractor cut and removed other merchantable standing or fallen trees outside of the work area, the Government was entitled by virtue of the contract provisions concerning the contractor's responsibility for property to deduct as a setoff from contract payments due to the contractor, treble damages pursuant to the applicable statutes of the State of Oregon with respect to the value of the illegally removed timber.....

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Equitable Adjustments

1. Under a contract providing for estimated quantities and unit prices, and stating that increases or decreases in such quantities are to be paid for only at such unit prices, the contractor is entitled to an equitable adjustment for additional quantities performed pursuant to a change order necessitating the duplication of supplemental work that had been completed previously and was not contemplated by the unit prices.....
2. Under a contract requiring construction at an early stage of soil bearing footings for the walls of a structure, where a large part of the work is suspended by the Government for more than five months pending redesign of such footings due to unstable soil conditions, and the contractor is thereby prevented for an unreasonable period of time from performing a substantial portion of the work concurrently with its other operations under the contract, and where the Board concludes that the unreasonable portion of such suspension had the effect of extending the period required for completion of the contract for a period of nine weeks, the contractor is entitled to an equitable adjustment pursuant to the standard "Suspension of Work" clause.....

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| 3. Under a contract providing for extra compensation for excavation of rock, which contained definitions of solid rock, ledges, and boulders, where the contractor encountered a changed condition consisting of many boulders of sizes exceeding those represented by the contract, the contractor is not entitled to an equitable adjustment on the basis that such boulders constituted solid rock, in the absence of timely notice to the contracting officer of the condition so that appropriate corrective measures could be considered; and in absence of a preponderance of evidence supporting the contractor's claim, the equitable adjustment allowed by the contracting officer's findings with respect to the volumes of boulders excavated will be affirmed and the appeal denied.----- | 86 |
| 4. A contractor is not entitled to an equitable adjustment under a claim of extra work for installing concrete ballast pads on top of underground tanks where the drawings clearly require such ballast pads to be included as part of the installation of the tanks, and such ballast pads are not referred to in any other separate pay item for concrete work, such as claimed by the contractor with respect to thrust blocks, anchor blocks, bearing pads and outfall pads.----- | 86 |
| 5. Under a tunnel construction contract that authorized the use of channel lagging between steel arches (to perform the necessary function of supporting the sides and roof of the tunnel), where a change was ordered in the contractor's proposed conventional method of attaching the channel steel lagging, which change required the cutting of notches in the channels and reversing the lagging so that the pieces of lagging were fitted (in part) between the steel arches, resulting in a technical restriction of excavation and concrete "pay" lines, the equitable adjustment contemplated by the standard form of Changes Clause should not be limited to the expense of cutting the notches but also should provide reasonable settlement for costs that the contractor had included in its bid on the assumption that the conventional lagging method and associated wider pay lines would be acceptable on the project.----- | 152 |
| 6. Under a contract for the construction of a road requiring the use of a soft type of rock known as oolite, to be obtained from adjacent borrow areas, and where no subsurface investigations had been conducted by the Government to determine the availability of oolite in sufficient quantities, the contractor was entitled to rely upon the representations in the contract with respect to the presence of sufficient oolite materials. Upon excavation of borrow pits designated by the Government when the contractor encountered much harder rock that was difficult to excavate and crush, and little if any oolite material, the condition so encountered was a changed condition of the first category within the meaning of Clause 4 of Standard Form 23A. The direction by the contracting officer that the hard rock be utilized for constructing the road was a constructive change and the contractor is entitled to an equitable adjustment upon either theory, whether a changed condition was encountered or a constructive change was made.----- | 218 |

CONTRACTS—Continued**DISPUTES AND REMEDIES—Continued****Jurisdiction**

1. An appellant's motion for reconsideration of a decision in which a hearing was scheduled for the purpose of establishing whether the board had jurisdiction over a claim for unnecessary acceleration of construction costs is denied where it is found that a crucial allegation made by appellant is contradicted by information furnished to the contracting officer in support of the claim and that the evidence to be developed at a hearing may resolve the apparent contradiction and the jurisdictional questions presented... 15
2. A government motion for reconsideration of a decision dismissing a contractor's claim for loss of commercial business as sounding in breach of contract is denied where the Government alleges that the claim could have been stated in such terms as to be cognizable as a claim arising under the contract but the claim as actually submitted is clearly not, in fact, cognizable thereunder, and the Government fails to show that there are material facts in dispute which could confer jurisdiction or that scheduling a hearing would otherwise serve any useful purpose..... 16
3. A claim first presented at the hearing of an appeal will be dismissed as being outside of the jurisdiction of the Board..... 28
4. Where a general release executed on settlement of amounts due under a contract contains exceptions as to certain pending claims but fails to reserve a claim previously made, because of alleged inadvertence on the part of the contractor, such omission precludes consideration of the merits of the claim by the Board and requires its dismissal as being outside of the Board's jurisdiction..... 35
5. Under a contract for clearing logs and other debris from a creek, where the contractor was permitted to remove merchantable logs so cleared and to dispose of them for its own account, in lieu of burning as required by the contract, and where in addition the contractor cut and removed other merchantable standing or fallen trees outside of the work area, the Government was entitled by virtue of the contract provisions concerning the contractor's responsibility for property to deduct as a setoff from contract payments due to the contractor, treble damages pursuant to the applicable statutes of the State of Oregon with respect to the value of the illegally removed timber..... 70
6. Where delays occur in the performance of the contractor's work pending decisions by the Government on questions concerning drawings and specifications, due to alleged lack of Government supervision, or because of the actions of other contractors, an appeal based on such claims will be dismissed as being outside the Board's jurisdiction, in the absence of a contract provision of the "pay for delay" type..... 305
7. Under a contract modification agreement for equitable adjustment purporting to settle and release claims presented by the contractor as additional expenses of coping with conditions encountered in constructing foundations of a building, an appeal based on the allegation that the contractor is entitled to additional compensation, for the reason that the conditions so encountered were alleged to be changed conditions, will be dismissed, since the Board has no authority to reform a contract..... 305

CONTRACTS—Continued**DISPUTES AND REMEDIES—Continued****Jurisdiction—Continued**

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| 8. A claim for additional compensation based on alleged unreasonable delay by the Government in issuing a notice to proceed will be dismissed as being outside the jurisdiction of the Board----- | 305 |
| 9. A mistake-in-bid claim previously ruled upon adversely by the Comptroller General was dismissed by the Board since, irrespective of the legal theory relied upon (e.g., the Law of Restitution and particularly the theory of Unjust Enrichment), the Board is without jurisdiction in the matter----- | 306 |

Substantial Evidence

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| 1. In cases involving a hearing the weight to be given to documents included in the appeal file on controverted issues is dependent upon the nature of the evidence offered in support by the party concerned; hence, the Board will accord only limited weight to the uncorroborated portion of an affidavit of a former officer of the appellant corporation who purports to have personal knowledge of the facts pertaining to the issues in dispute, even though the appellant shows by uncontradicted testimony that the former officer is no longer employed by the corporation and that his present whereabouts are unknown----- | 107 |
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FORMATION AND VALIDITY**Authority to Make**

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| 1. An informal agreement between the contractor and a Government inspector in substance that excavation at three pond sites of all boulders and other smaller material should be billed as one hundred percent solid rock, did not bind the Government because of the inspector's lack of authority, and was properly rejected by the contracting officer----- | 86 |
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Bid and Award

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| 1. The failure of a high bidder at a sealed bid auction to submit with his bid a statement of his citizenship and interests in other holdings required by regulation and the invitation to bid may be waived where the default has given him no advantage over the other bidder----- | 209 |
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Governing Law

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| 1. Under a contract for clearing logs and other debris from a creek, where the contractor was permitted to remove merchantable logs so cleared and to dispose of them for its own account, in lieu of burning as required by the contract, and where in addition the contractor cut and removed other merchantable standing or fallen trees outside of the work area, the Government was entitled by virtue of the contract provisions concerning the contractor's responsibility for property to deduct as a setoff from contract payments due to the contractor, treble damages pursuant to the applicable statutes of the State of Oregon with respect to the value of the illegally removed timber----- | 70 |
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Implied and Constructive Contracts

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1. Under a contract providing for estimated quantities and unit prices, and stating that increases or decreases in such quantities are to be paid for only at such unit prices, the contractor is entitled to an equitable adjustment for additional quantities performed pursuant to a change order necessitating the duplication of supplemental work that had been completed previously and was not contemplated by the unit prices..... 28
2. Under a contract for the construction of a road requiring the use of a soft type of rock known as oolite, to be obtained from adjacent borrow areas, and where no subsurface investigations had been conducted by the Government to determine the availability of oolite in sufficient quantities, the contractor was entitled to rely upon the representations in the contract with respect to the presence of sufficient oolite materials. Upon excavation of borrow pits designated by the Government when the contractor encountered much harder rock that was difficult to excavate and crush, and little if any oolite material, the condition so encountered was a changed condition of the first category within the meaning of Clause 4 of Standard Form 23A. The direction by the contracting officer that the hard rock be utilized for constructing the road was a constructive change and the contractor is entitled to an equitable adjustment upon either theory, whether a changed condition was encountered or a constructive change was made.... 218
3. Directions by the contracting officer for the use of alternative construction practices or procedures that were specifically provided for in the contract did not constitute a constructive change. At the time the work was performed the contractor accepted such practices or procedures without contending that excess costs would be involved. The Board concluded that this indicated that utilization of the alternatives to meet conditions encountered on a canal project more than fifteen miles in length over ridges, benches, canyons and other varying features of the terrain was a matter that had been expected by both parties, rather than work of a different character than that required by the original terms of the contract..... 254

Mistakes

1. Where a general release executed on settlement of amounts due under a contract contains exceptions as to certain pending claims but fails to reserve a claim previously made, because of alleged inadvertence on the part of the contractor, such omission precludes consideration of the merits of the claim by the Board and requires its dismissal as being outside of the Board's jurisdiction..... 35
2. A mistake-in-bid claim previously ruled upon adversely by the Comptroller General was dismissed by the Board since, irrespective of the legal theory relied upon (e.g., the Law of Restitution and particularly the theory of Unjust Enrichment), the Board is without jurisdiction in the matter..... 306

CONTRACTS—Continued**PERFORMANCE OR DEFAULT****Compensable Delays**

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| 1. Where delays occur in the performance of the contractor's work pending decisions by the Government on questions concerning drawings and specifications, due to alleged lack of Government supervision, or because of the actions of other contractors, an appeal based on such claims will be dismissed as being outside the Board's jurisdiction, in the absence of a contract provision of the "pay for delay" type----- | 305 |
| 2. A claim for additional compensation based on alleged unreasonable delay by the Government in issuing a notice to proceed will be dismissed as being outside the jurisdiction of the Board----- | 305 |

Inspection

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| 1. An informal agreement between the contractor and a Government inspector in substance that excavation at three pond sites of all boulders and other smaller material should be billed as one hundred percent solid rock, did not bind the Government because of the inspector's lack of authority, and was properly rejected by the contracting officer----- | 86 |
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Release and Settlement

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| 1. Where a general release executed on settlement of amounts due under a contract contains exceptions as to certain pending claims but fails to reserve a claim previously made, because of alleged inadvertence on the part of the contractor, such omission precludes consideration of the merits of the claim by the Board and requires its dismissal as being outside of the Board's jurisdiction----- | 35 |
| 2. Under a contract modification agreement for equitable adjustment purporting to settle and release claims presented by the contractor as additional expenses of coping with conditions encountered in constructing foundations of a building, an appeal based on the allegation that the contractor is entitled to additional compensation, for the reason that the conditions so encountered were alleged to be changed conditions, will be dismissed, since the Board has no authority to reform a contract---- | 305 |

Suspension of Work

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| 1. Under a contract requiring construction at an early stage of soil bearing footings for the walls of a structure, where a large part of the work is suspended by the Government for more than five months pending redesign of such footings due to unstable soil conditions, and the contractor is thereby prevented for an unreasonable period of time from performing a substantial portion of the work concurrently with its other operations under the contract, and where the Board concludes that the unreasonable portion of such suspension had the effect of extending the period required for completion of the contract for a period of nine weeks, the contractor is entitled to an equitable adjustment pursuant to the standard "Suspension of Work" clause----- | 35 |
|--|----|

CONTRACTS—Continued

PERFORMANCE OR DEFAULT—Continued

Suspension of Work—Continued

Page

2. Where delays occur in the performance of the contractor's work pending decisions by the Government on questions concerning drawings and specifications, due to alleged lack of Government supervision, or because of the actions of other contractors, an appeal based on such claims will be dismissed as being outside the Board's jurisdiction, in the absence of a contract provision of the "pay for delay" type-----

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DESERT LAND ENTRY

CULTIVATION AND RECLAMATION

1. Where in a reasonable farming operation conducted by a farmer owning his own farm, crops would be grown on different areas of the farm in two growing seasons, a desert land entryman may use a two season cropping plan in computing the amount of acreage that can be served by a given amount of water-----
2. It is questionable whether peak moisture requirements should be disregarded in determining the acreage in an entry that can be irrigated from the source of water available-----
3. Where an entryman plans a two season cropping operation in which parts of his entry will lie idle part of each year, he is not entitled to an allowance for fallowing in the absence of proof that fallowing is a normal practice for the type of crop plan that he has-----
4. Final proof must be rejected as to an area of desert land entry which can be irrigated, if at all, only by mobile pumping equipment not on the entry at the expiration of its statutory life-----

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DISTRIBUTION SYSTEM

1. Final proof must be rejected as to an area of desert land entry which can be irrigated, if at all, only by mobile pumping equipment not on the entry at the expiration of its statutory life-----

1

FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES ACT

1. Guam does not fall within the term "executive agency" as used in the Federal Property and Administrative Services Act and the implementing Federal Procurement Regulations-----

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GRAZING LEASES

PREFERENCE RIGHT APPLICANTS

1. An applicant for a renewal of a section 15 grazing lease may assert a preference right under the exception clause of that section based upon the ownership and control of cornering land even though more than 90 days have elapsed since the land originally became available for leasing, especially where he or his predecessors have asserted such a right from the time when section 15 leases first became available-----

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GRAZING PERMITS AND LICENSES

GENERALLY

1. Where lands which become additionally available for disposition of grazing privileges consist of isolated tracts of small carrying capacity, the limited grazing privileges will be disposed of on the

GRAZING PERMITS AND LICENSES—Continued

GENERALLY—Continued

Page

basis of good range practice and past usage in accordance with a provision of the Range Code rather than on a standard of customary use fixed by a State Director where application of the standard is fruitless in view of use of the tracts under allegedly invalid subleases or transfers-----

120

CANCELLATION AND REDUCTIONS

1. On remand of a case involving the award of grazing privileges on an annual basis, the applicant can introduce evidence to show that the grazing capacity of the range has improved since the date of the range survey on which the contested award was made; however, a reduction in grazing privileges based on a range survey will not be changed unless the applicant can demonstrate why or in what way the range survey was in error-----

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RANGE SURVEYS

1. On remand of a case involving the award of grazing privileges on an annual basis, the applicant can introduce evidence to show that the grazing capacity of the range has improved since the date of the range survey on which the contested award was made; however, a reduction in grazing privileges based on a range survey will not be changed unless the applicant can demonstrate why or in what way the range survey was in error-----

120

GUAM

GENERALLY

1. Guam does not fall within the term "executive agency" as used in the Federal Property and Administrative Services Act and the implementing Federal Procurement Regulations-----
2. The Buy American Act does not apply to purchases by the Government of Guam for use on Guam-----
3. Suppliers on the Island of Guam are considered domestic sources of supply under the Buy American Act, and Guam is not an area "outside the United States" for the purpose of applying bid evaluation standards under the Balance of Payment Program-----

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INDIANS

CARE OF CHILDREN

1. Where Indian court has properly terminated the relationship of natural Indian parents to a child, Indian court standing *in loco parentis* may submit child to the jurisdiction of the state courts to secure his adoption, regardless that child is resident of an Indian reservation-----

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CIVIL JURISDICTION

1. Where Indian court has properly terminated the relationship of natural Indian parents to a child, Indian court standing *in loco parentis* may submit child to the jurisdiction of the state courts to secure his adoption, regardless that child is resident of an Indian reservation-----

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INDIANS—Continued

DOMESTIC RELATIONS

Page

1. Where Indian court has properly terminated the relationship of natural Indian parents to a child, Indian court standing *in loco parentis* may submit child to the jurisdiction of the state courts to secure his adoption, regardless that child is resident of an Indian reservation----- 397

MINERAL LEASING ACT

GENERALLY

1. The withdrawal of land from only public land status, e.g., from entry, location, selection, sale or other disposition does not toll the applicability of the mineral leasing laws. The withdrawal order must express a clear intent to toll the applicability of the mineral leasing laws----- 97
2. A partnership composed exclusively of United States citizens may hold a lease or permit issued under the Mineral Leasing Act----- 165

MINERAL LEASING ACT FOR ACQUIRED LANDS

GENERALLY

1. The withdrawal of land from only public land status, e.g., from entry, location, selection, sale or other disposition does not toll the applicability of the mineral leasing laws. The withdrawal order must express a clear intent to toll the applicability of the mineral leasing laws----- 97

MINES AND MINING

1. Lands which have been reserved from the public domain or acquired by the United States are not subject to the mining laws, unless opened by the statute, or a withdrawal order provides for the continued applicability of the mining laws, or a later withdrawal order reinstates the applicability of the mining laws----- 97

MINING CLAIMS

GENERALLY

1. The Classification and Multiple Use Act of Sept. 19, 1964 (78 Stat. 986; 43 U.S.C. secs. 1411-18) authorizes, under certain circumstances, the segregation of public land from appropriation under the general mining laws, but it does not provide authority to restrict or condition the mining activities authorized by the general mining laws----- 187
2. Where a mining claimant files a verified statement pursuant to a proceeding initiated by the Forest Service in accordance with section 5 of the Surface Resources Act and the Forest Service subsequently recommends the initiation of a contest proceeding under the general mining laws to determine the validity of the claim (rather than a proceeding under section 5(c) of the act to determine the Government's right to manage the surface resources), since the responsibility for the administration of the use and occupancy of the national forests is vested in the Department of Agriculture, this Department is without the authority to inquire into the reasons or justifications for the initiation of such a proceeding and is without the authority to change, as a matter of its own policy, the nature of the proceeding from the one recommended by the Forest Service----- 245

MINING CLAIMS—Continued

CONTESTS

Page

1. Although reports by Departmental personnel on their examinations of mining claims are generally considered as confidential intra-departmental communications which are not to be made available to mining claimants, disclosure of the factual information in such reports will be permitted..... 161
2. Where the Government contests a mining claim, the burden of proof is on the claimant to establish the validity of his claim..... 191

DETERMINATION OF VALIDITY

1. No hearing is required to declare mining claims void *ab initio* where the records of the Department show that at the time of location of the claims the land was not open to such location..... 142
2. Although the administration of the national forests is vested in the Secretary of Agriculture, the Secretary of the Interior has the responsibility of determining the validity of mining claims in the national forests and providing the administrative forum by which that Department may determine its right to possession, control, and administration of lands on which mining claims have been located within a national forest..... 245
3. Where it has been shown as to a number of mining claims located for perlite, and for which applications for patents have been filed, that the amount of the deposits on the claims is excessively large in relation to the market that exists, only those claims can be found valid which by reason of location and volume and quality of deposits would make the most feasible mining operation and have a reasonable prospect of success; the remaining claims must be held invalid for lack of discovery..... 292

DISCOVERY

1. To constitute a valid discovery on a mining claim there must be a discovery on the claim of a mineral deposit that would warrant a prudent man in the expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine in the reasonably near future; this means that there must be a reasonable prospect that the mine can be operated to yield a profit.... 191
2. The requirement that a claimant must show that he can make a profit from the operation of a mine does not mean either that a profit must be proved as a certainty or that it must be established as a present fact. The evidence need only support the conclusion that a person of ordinary prudence would risk his labor and means with a reasonable expectation of developing a valuable mine.... 191
3. If a mining claimant would establish that measures might be employed which would eliminate the necessity to pay freight to the nearest markets, he must produce sufficient evidence of the feasibility and effect of such measures, and must show that the prudent man would expend such additional labor and means as would be reasonably required for their implementation..... 191
4. Where a mining claim is based upon the existence of a mineral deposit of low grade compared to other deposits which are being utilized to produce the same mineral, the technology proposed for extracting the mineral has been applied only on a small scale in a laboratory on higher grade ores than exist in the claim, and the costs

MINING CLAIMS—Continued

DISCOVERY—Continued

Page

- of producing and marketing the mineral are indicated to be in excess of the returns for the mineral, the claimant has not sustained the burden of proof necessary to validate the mining claim. 192
5. To satisfy the requirement for discovery on mining claims located for perlite, it must be shown, in addition to the fact that there is a reasonable prospect that the perlite can be mined, transported from the mine to the shipping point, screened and crushed and sold at a price which would yield a profit, that there is an existing demand for the crushed product and that a reasonably prudent man would be justified in expending his time and effort in his attempt to capture a share of the existing market. 292
6. Where it has been shown as to a number of mining claims located for perlite, and for which applications for patents have been filed, that the amount of the deposits on the claims is excessively large in relation to the market that exists, only those claims can be found valid which by reason of location and volume and quality of deposits would make the most feasible mining operation and have a reasonable prospect of success; the remaining claims must be held invalid for lack of discovery. 292
7. A mineral showing which may lead a miner to stake a claim does not necessarily constitute the discovery which is required by the mining laws to validate a claim. 388
8. The rule of discovery followed by the Department is the test laid down in *Castle v. Womble*, and the Department has not required that a mining claimant show that he has found a mineral deposit which can assuredly be mined at a profit. 388
9. Mining claims are properly held to be null and void where only insignificant values in copper, gold, silver, and molybdenum have been found on the claims which would, at most, warrant only further exploration in an attempt to find valuable mineralization. 388

HEARINGS

1. No hearing is required to declare mining claims void *ab initio* where the records of the Department show that at the time of location of the claims the land was not open to such location. 142

LOCATION

1. The location of a valid mining claim vests in the locator a present right of possession, and where, because land has been withdrawn from such entry, a locator can obtain no present interest in the land, a mining location on such land can be only a nullity. 142

PATENT

1. The Secretary of the Interior is not authorized to issue a patent to a mining claim until he is satisfied that the requirements of the law have been met. 192

SPECIAL ACTS

1. The Classification and Multiple Use Act of Sept. 19, 1964 (78 Stat. 986; 43 U.S.C. secs. 1411-18) authorizes, under certain circumstances, the segregation of public land from appropriation under the general mining laws, but it does not provide authority to restrict or condition the mining activities authorized by the general mining laws. 187

MINING CLAIMS—Continued**WITHDRAWN LAND**

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|--|------|
| | Page |
| 1. Mining claims located on land withdrawn from such entry are null and void <i>ab initio</i> and will not be validated by the modification or revocation of the order of withdrawal to open the land thereafter to mineral entry----- | 141 |
| 2. Mining claims are properly declared to be null and void <i>ab initio</i> where they were located on lands withdrawn for reclamation purposes; the withdrawal cannot be deemed to have expired merely because it was stated to be for a temporary purpose and more than 19 years had elapsed before the first of the claims were located__ | 386 |

MINING OCCUPANCY ACT**PRINCIPAL PLACE OF RESIDENCE**

- | | |
|--|-----|
| 1. The act of Oct. 23, 1962, requires that an applicant or his predecessors must have occupied valuable improvements on the claim as a principal place of residence for the 7-year period immediately preceding July 23, 1962, and where there is a break of several years in that period the requirement is not satisfied even though a predecessor of the applicant may have occupied the claim as a principal place of residence for more than 7 years including time prior to July 23, 1955----- | 378 |
| 2. Where the purchaser of a claim visits a cabin on the claim on an intermittent basis primarily for the purpose of repairing the cabin and readying it for occupancy, while he maintains a regular residence elsewhere, the cabin does not constitute "a principal place of residence" within the meaning of section 2 of the act of Oct. 23, 1962, and an application for the conveyance of land based upon such use is properly rejected----- | 378 |

QUALIFIED APPLICANT

- | | |
|---|-----|
| 1. A qualified applicant for the conveyance of land under the act of Oct. 23, 1962, must have satisfied the requirements of the act as of that date and neither his intent to make a mining claim site a principal place of residence at a future date nor the carrying out of such intent after Oct. 23, 1962, can serve to qualify an applicant whose use of the site prior to the critical date did not satisfy the requirements of the act as to occupancy of the site as a principal place of residence----- | 378 |
|---|-----|

MULTIPLE USE

- | | |
|--|-----|
| 1. The Classification and Multiple Use Act of Sept. 19, 1964 (78 Stat. 986; 43 U.S.C. secs. 1411-18) authorizes, under certain circumstances, the segregation of public land from appropriation under the general mining laws, but it does not provide authority to restrict or condition the mining activities authorized by the general mining laws----- | 187 |
|--|-----|

OFFICERS AND EMPLOYEES

- | | |
|--|----|
| 1. A corporate officer, as long as he acts in good faith, is not precluded, as an individual, from engaging in a business similar to that carried on by the corporation of which he is an officer, and, if the evidence fails to show that there was an obligation on his part to act for the corporation with respect to a particular matter, he violates no legal or moral duty if he acts for himself in the same matter----- | 57 |
|--|----|

OIL AND GAS LEASES

ACQUIRED LANDS LEASES

	Page
1. Where jurisdiction over oil and gas deposits in land acquired by the United States for military purposes has been transferred by the Department of the Army to the Secretary of the Interior and the land is later declared surplus pursuant to the provisions of the Federal Property and Administrative Services Act of June 30, 1949, such oil and gas deposits are not subject to leasing under the Mineral Leasing Act for Acquired Lands because that act excludes from leasing oil and gas deposits in lands reported as surplus-----	133
2. Where the Secretary has agreed to a plan to remove possible objections to the authority of the General Services Administration to sell certain oil and gas deposits and the deposits are disposed in accordance with the plan, it is within his discretionary authority to reject offers to lease the deposits under the Mineral Leasing Act for Acquired Lands, whether or not the sale was legally proper--	133
3. The Secretary may in the exercise of his discretionary authority reject noncompetitive offers to lease oil and gas deposits in acquired lands if he determines that leasing would be detrimental to the public interest without regard to the propriety of the disposition of the deposits under another statute-----	133
4. Where land was conveyed to the United States under a deed in which the grantor reserved oil and gas rights in the conveyed land "for a primary period ending June 30, 1965," title to the oil and gas deposits in such land did not vest in the United States until July 1, 1965, and an acquired lands oil and gas lease offer filed for the land of June 30, 1965, is properly rejected as prematurely filed -----	168
5. Where land was conveyed to the United States under a deed wherein the grantor reserved all minerals, together with the right to mine, drill, remove and operate for such minerals "until Nov. 4, 1965," with the express provision that if the reserved right to mine etc. "is not being exercised on Nov. 4, 1965, then and upon said Nov. 4, 1965, the said coal, oil, gas and minerals, and all rights thereunder shall become property of the Grantee," and the right was not exercised on that date, title to the minerals vested in the United States on the prescribed day, and an acquired lands oil and gas lease offer filed the same day was properly accepted for consideration by the land office-----	173
6. Former Departmental regulation 43 CFR 192.43 (b), which prescribed the manner in which expired, canceled, relinquished and terminated oil and gas leases should be listed for further leasing, did not require a land office to describe listed acquired lands in the same manner as a lease offeror in describing the same lands in his offer, and where a portion of a section of acquired land the external limits of which section were surveyed under the public land survey system was described in a list of available lands by section number, excluding a tract which was not surveyed as a legal subdivision of the section and which was not described by metes and bounds but only by a designation given in a private survey of the tract, the posting was not deficient so as to make the land unavailable for leasing-----	357

OIL AND GAS LEASES—Continued APPLICATIONS

Generally

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|---|------|
| | Page |
| 1. An act, in order to be collusive, must result from an agreement, scheme or plan involving more than one party, and the fact that a particular lease assignment, if agreed upon by the parties to the assignment prior to the filing of the lease offer which resulted in issuance of a lease, would have demonstrated collusion in the filing of the offer does not mean that the same transaction shows collusion in the absence of evidence of a prior agreement between the parties to the assignment----- | 47 |
| 2. Where land was conveyed to the United States under a deed in which the grantor reserved oil and gas rights in the conveyed land "for a primary period ending June 30, 1965," title to the oil and gas deposits in such land did not vest in the United States until July 1, 1965, and an acquired lands oil and gas lease offer filed for the land of June 30, 1965, is properly rejected as prematurely filed ----- | 168 |
| 3. Where land was conveyed to the United States under a deed wherein the grantor reserved all minerals, together with the right to mine, drill, remove and operate for such minerals "until Nov. 4, 1965," with the express provision that if the reserved right to mine etc. "is not being exercised on Nov. 4, 1965, then and upon said Nov. 4, 1965, the said coal, oil, gas and minerals, and all rights thereunder shall become property of the Grantee," and the right was not exercised on that date, title to the minerals vested in the United States on the prescribed day and an acquired lands oil and gas lease offer filed the same day was properly accepted for consideration by the land office----- | 173 |

Description

- | | |
|---|-----|
| 1. "Legal Subdivision." It is not proper to reject an oil and gas lease offer which describes land in one section as the NW $\frac{1}{4}$ and land in another section as the N $\frac{1}{2}$, where each section is irregular and the NW $\frac{1}{4}$ of one has been subdivided wholly into lots and the N $\frac{1}{2}$ of the other has been partially subdivided into lots, on the ground that the offer failed to describe the land by "legal subdivision" in accordance with the latest plat of survey, where that term has been used to include fractional as well as regular subdivisions.--- | 373 |
| 2. A description in an acquired lands oil and gas lease offer of a parcel of land smaller than a quarter-quarter section embraced within a public land survey and purportedly in conformity with it must describe the subdivisions of the quarter-quarter section in the same manner as larger subdivisions of a section and quarter-section would be described, and cannot merely give a proportionate ratio, such as the "E $\frac{3}{4}$ " of the quarter-quarter section, unrelated to the quadrant method upon which the public land surveys are based and understood----- | 392 |
| 3. The description in an acquired lands oil and gas lease offer of a parcel of land in a surveyed section as the "E $\frac{3}{4}$ of the SE $\frac{1}{4}$ NW $\frac{1}{4}$ " of the section is defective, and a leased issued pursuant to the offer must be canceled as to that parcel where a junior offer properly | |

OIL AND GAS LEASES—Continued

APPLICATIONS—Continued

Description—Continued

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describes the land in conformity with the rules of the public land survey system as the $E\frac{1}{2}SE\frac{1}{4}NW\frac{1}{4}$ and $E\frac{1}{2}W\frac{1}{2}SE\frac{1}{4}NW\frac{1}{4}$ -----

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Drawings

1. Where two officers of a corporation, who constitute all of the stockholders, directors, and officers of the corporation, as individuals, file noncompetitive oil and gas lease offers for the same land for inclusion in the same drawing of simultaneously filed lease offers, and no offer is filed on behalf of the corporation, it is not necessarily to be presumed that the individual offers are filed for the corporation, and where there is no evidence that the offerors breached their fiduciary duty to the corporation so as to create a corporate interest in their offers, the offers should not be rejected on the ground that the corporation had more than one chance in the drawing or that the statement in each offer that the offeror is the sole party in interest was false-----

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Sole Party in Interest

1. Where a person files an oil and gas lease offer through a leasing service under an arrangement whereby the leasing service advances the first year's rental, selects the land, and controls the address at which the offeror may be reached, but no enforceable agreement is entered into whereby the offeror is obligated to transfer any interest in any lease to be issued to the leasing service, the service is not a party in interest in the offer merely because it may have a hope or expectancy of acquiring an interest, and the offeror is not precluded from stating that he is the sole party in interest in the offer-----
2. The regulation which requires that an oil and gas lease offer, "when first filed," be accompanied by a signed statement of the offeror identifying all interests in the offer does not require an offeror, who states that he is the sole party in interest, to disclose an agreement to sell his lease entered into by him after the filing of his offer but before the time of the drawing of simultaneous lease offers in which his offer participates, and his offer cannot be rejected on the ground that he did not comply with the regulation in failing to disclose the interest of his vendee-----

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46

ASSIGNMENTS OR TRANSFERS

1. An act, in order to be collusive, must result from an agreement, scheme or plan involving more than one party, and the fact that a particular lease assignment, if agreed upon by the parties to the assignment prior to the filing of the lease offer which resulted in issuance of a lease, would have demonstrated collusion in the filing of the offer does not mean that the same transaction shows collusion in the absence of evidence of a prior agreement between the parties to the assignment-----
2. The Secretary of the Interior is authorized under section 5(a) (1) of the Outer Continental Shelf Lands Act to approve an assignment

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OIL AND GAS LEASES—Continued

ASSIGNMENTS OF TRANSFERS

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- of rights in a portion of the area of an Outer Continental Shelf oil and gas lease to a depth limited to the base of a specified zone, but such an assignment will result in the creation of a separate and independent lease as to the portion of the land assigned, and, in the absence of any express provision to the contrary, the holder of each lease resulting from the assignment is chargeable for the payment of rental or royalty for the entire area covered by his lease in accordance with the terms of the original lease notwithstanding that this may result in multiple payment of rental or royalty for the same area----- 229
3. Authority does not exist under the mineral leasing laws for recognizing oil interests separate and apart from gas interests in the same land, and the Department cannot approve an assignment which recognizes, in the same land, oil interests in one party and gas rights in another----- 229
4. An instrument in which an assignor agrees to "grant, bargain, sell, convey, transfer, assign, set over, abandon and deliver" all of the assignor's interest in a part of a leasehold is an assignment rather than an operating agreement and, if approved, has the effect to segregating the original lease into separate leases in accordance with the terms of the assignment----- 229
5. Where the Department has given its approval to assignments which would segregate an Outer Continental Shelf oil and gas lease into separate leases by area, depth and product, and where it appears that it was not the intent of the assignors or assignees to create such separate lease interests, and it is not clearly shown that the Department intended to approve such assignments or that it had authority to approve them even if approval were intended, the approval will be rescinded, and the parties to the assignments will be permitted to submit for approval proper instruments reflecting their intent----- 229

CANCELLATION

1. The description in an acquired lands oil and gas lease offer of a parcel of land in a surveyed section as the "E $\frac{3}{4}$ of SE $\frac{1}{4}$ NW $\frac{1}{4}$ " of the section is defective, and a lease issued pursuant to the offer must be canceled as to that parcel where a junior offer properly describes the land in conformity with the rules of the public land survey as the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ ----- 393

DESCRIPTION OF LAND

1. Former Departmental regulation 43 CFR 192.43 (b), which prescribed the manner in which expired, canceled, relinquished and terminated oil and gas leases should be listed for further leasing, did not require a land office to describe listed acquired lands in the same manner as a lease offeror in describing the same lands in his offer, and where a portion of a section of acquired land the external limits of which section were surveyed under the public land survey system was described in a list of available lands by section number, excluding a tract which was not surveyed as a legal sub-

OIL AND GAS LEASES—Continued**DESCRIPTION OF LAND—Continued**

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division of the section and which was not described by metes and bounds but only by a designation given in a private survey of the tract, the posting was not deficient so as to make the land unavailable for leasing-----

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2. The description in an acquired lands oil and gas lease offer of a parcel of land in a surveyed section as the "E $\frac{3}{4}$ of SE $\frac{1}{4}$ NW $\frac{1}{4}$ " of the section is defective, and a lease issued pursuant to the offer must be canceled as to that parcel where a junior offer properly describes the land in conformity with the rules of the public land survey system as the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ -----

393

DISCRETION TO LEASE

1. Where the Secretary has agreed to a plan to remove possible objections to the authority of the General Services Administration to sell certain oil and gas deposits and the deposits are disposed in accordance with the plan, it is within his discretionary authority to reject offers to lease the deposits under the Mineral Leasing Act for Acquired Lands, whether or not the sale was legally proper---
2. The Secretary may in the exercise of his discretionary authority reject noncompetitive offers to lease oil and gas deposits in acquired lands if he determines that leasing would be detrimental to the public interest without regard to the propriety of the disposition of the deposits under another statute-----

133

133

FIRST QUALIFIED APPLICANT

1. The description in an acquired lands oil and gas lease offer of a parcel of land in a surveyed section as the "E $\frac{3}{4}$ of SE $\frac{1}{4}$ NW $\frac{1}{4}$ " of the section is defective, and a lease issued pursuant to the offer must be canceled as to that parcel where a junior offer properly describes the land in conformity with the rules of the public land survey system as the E $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ and E $\frac{1}{2}$ W $\frac{1}{2}$ SE $\frac{1}{4}$ NW $\frac{1}{4}$ -----

393

KNOWN GEOLOGICAL STRUCTURE

1. Land which becomes within the known geological structure of a producing oil or gas field before the actual issuance of a lease, even though it was not within such a structure at the time when the offer for the lease was filed, may not be leased noncompetitively---

285

LANDS SUBJECT TO

1. Where land was conveyed to the United States under a deed in which the grantor reserved oil and gas rights in the conveyed land "for a primary period ending June 30, 1965," title to the oil and gas deposits in such land did not vest in the United States until July 1, 1965, and an acquired lands oil and gas lease offer filed for the land of June 30, 1965, is properly rejected as prematurely filed---
2. Where land was conveyed to the United States under a deed wherein the grantor reserved all minerals, together with the right to mine, drill, remove and operate for such minerals "until Nov. 4, 1965," with the express provision that if the reserved right to mine etc. "is not being exercised on Nov. 4, 1965, then and upon said Nov. 4, 1965, the said coal, oil, gas and minerals, and all rights thereunder shall become property of the Grantee," and

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OIL AND GAS LEASES—Continued**LANDS SUBJECT TO—Continued**

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the right was not exercised on that date, title to the minerals vested in the United States on the prescribed day, and an acquired lands oil and gas lease offer filed the same day was properly accepted for consideration by the land office.....

173

NONCOMPETITIVE LEASES

1. The filing of an offer for a noncompetitive lease creates no vested rights in the offeror, and, if lands embraced in the offer become within the known geological structure of a producing oil or gas field after the filing of the offer but before the issuance of a lease, the offer must be rejected and no preferential rights will be conferred upon the offeror.....

285

RENTALS

1. The Secretary of the Interior is authorized under section 5(a) (1) of the Outer Continental Shelf Lands Act to approve an assignment of rights in a portion of the area of an Outer Continental Shelf oil and gas lease to a depth limited to the base of a specified zone, but such an assignment will result in the creation of a separate and independent lease as to the portion of the land assigned, and, in the absence of any express provision to the contrary, the holder of each lease resulting from the assignment is chargeable for the payment of rental or royalty for the entire area covered by his lease in accordance with the terms of the original lease notwithstanding that this may result in multiple payment of rental or royalty for the same area.....

229

ROYALTIES

1. The Secretary of the Interior is authorized under section 5(a) (1) of the Outer Continental Shelf Lands Act to approve an assignment of rights in a portion of the area of an Outer Continental Shelf oil and gas lease to a depth limited to the base of a specified zone, but such an assignment will result in the creation of a separate and independent lease as to the portion of the land assigned, and, in the absence of any express provision to the contrary, the holder of each lease resulting from the assignment is chargeable for the payment of rental or royalty for the entire area covered by his lease in accordance with the terms of the original lease notwithstanding that this may result in multiple payment of rental or royalty for the same area.....

229

OUTER CONTINENTAL SHELF LANDS ACT**OIL AND GAS LEASES**

1. The Secretary of the Interior is authorized under section 5(a) (1) of the Outer Continental Shelf Lands Act to approve an assignment of rights in a portion of the area of an Outer Continental Shelf oil and gas lease to a depth limited to the base of a specified zone, but such an assignment will result in the creation of a separate and independent lease as to the portion of the land assigned, and, in the absence of any express provision to the contrary, the holder of each lease resulting from the assignment is chargeable for the payment of rental or royalty for the entire area covered

OUTER CONTINENTAL SHELF LANDS ACT—Continued**OIL AND GAS LEASES—Continued**

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- by his lease in accordance with the terms of the original lease notwithstanding that this may result in multiple payment of rental or royalty for the same area..... 229
2. Authority does not exist under the mineral leasing laws for recognizing oil interests separate and apart from gas interests in the same land, and the Department cannot approve an assignment which recognizes, in the same land, oil interests in one party and gas rights in another..... 229
3. Where the Department has given its approval to assignments which would segregate an Outer Continental Shelf oil and gas lease into separate leases by area, depth and product, and where it appears that it was not the intent of the assignors or assignees to create such separate lease interests, and it is not clearly shown that the Department intended to approve such assignments or that it had authority to approve them even if approval were intended, the approval will be rescinded, and the parties to the assignments will be permitted to submit for approval proper instruments reflecting their intent..... 229

PHOSPHATE LEASES AND PERMITS**PERMITS**

1. An application for a phosphate prospecting permit is properly rejected when information is available from which the existence and workability of the phosphate deposits in the land applied for can be determined; it is not necessary that the information specifically describe the phosphate deposits within the land applied for, where detailed information is available regarding the existence of a workable deposit in adjacent lands and geologic and other surrounding external conditions, from which the workability of the deposits in the subject lands can be reasonably inferred 76

PUBLIC LANDS**CLASSIFICATION**

1. The Classification and Multiple Use Act of Sept. 19, 1964 (78 Stat. 986; 43 U.S.C. secs. 1411-18) authorizes, under certain circumstances, the segregation of public land from appropriation under the general mining laws, but it does not provide authority to restrict or condition the mining activities authorized by the general mining laws..... 187

JURISDICTION OVER

1. Where, subsequent to survey, lands have formed by accretion in front of lots which are part of an area withdrawn from entry under the public land laws and placed under the administrative jurisdiction of an agency of the Federal Government, the administering agency acquires jurisdiction over the accreted lands, and the lands become subject to the same restricted usage as the lands to which they are accreted..... 142

PUBLIC LANDS—Continued**RIPARIAN RIGHTS**

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| | Page |
| 1. Where an island which was once public land owned by the United States is gradually eroded away in its entirety by the force of the river in which it lay and then fast land is formed on the site formerly occupied by the island by the process of accretion to a bank of the river which is privately owned, the United States can not assert title to such land as public land----- | 417 |

PUBLIC RECORDS

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| 1. Although reports by Departmental personnel on their examinations on mining claims are generally considered as confidential intra-departmental communications which are not to be made available to mining claimants, disclosure of the factual information in such reports will be permitted----- | 161 |
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RAILROAD GRANT LANDS

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| 1. Legal title, although not record title, to granted lands passes to a railroad under a railroad land grant act upon the filing of a map of definite location of the railroad and such title is subject to divestiture by adverse possession under state laws prior to the issuance of patent to the granted lands----- | 125 |
| 2. Where a railroad has lost title to granted but unpatented lands as a result of adverse possession, a release filed by the railroad pursuant to the Transportation Act of 1940 reconveys or relinquishes nothing to the United States----- | 125 |
| 3. Although the title of a railroad to unpatented granted land may have been extinguished by adverse possession, the Department has no authority in the absence of legislation to issue a patent to the land to the adverse possessor----- | 125 |

REGULATIONS**WAIVER**

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| 1. The failure of a high bidder at a sealed bid auction to submit with his bid a statement of his citizenship and interests in other holdings required by regulation and the invitation to bid may be waived where the default has given him no advantage over the other bidder----- | 209 |
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RULES OF PRACTICE**APPEALS****Generally**

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| 1. Where in a motion for reconsideration the appellant questions the Board's finding that a substantial portion of a claim for rock excavation represents work performed below subgrade for which the contract provides no basis for reimbursement but fails to show that the contracting officer or the Government engineering personnel concerned were involved in any way in the appellant's decision to proceed with the subgrade excavation, the Board's earlier decision that the work so performed was voluntary and not of the character for which the Government is liable is affirmed---- | 106 |
| 2. The overriding consideration in ruling upon requests for discovery is whether making available the information sought is consistent with the objective of securing just and inexpensive determination of appeals without unnecessary delay, with consideration given to | |

RULES OF PRACTICE—Continued

APPEALS—Continued

Generally—Continued

(i) the attainment of that objective in the particular case; (ii) the showing made by the party seeking discovery; (iii) the claims of privilege asserted; and (iv) the likelihood of hardship resulting from granting particular requests. Absent hardship and privilege, the scope of inquiry may encompass any material relevant to the subject matter and need not be limited to the precise issues involved, even though such material may not be admissible as evidence at the hearing-----

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Burden of Proof

1. In cases involving a hearing the weight to be given to documents included in the appeal file on controverted issues is dependent upon the nature of the evidence offered in support by the party concerned; hence, the Board will accord only limited weight to the uncorroborated portion of an affidavit of a former officer of the appellant corporation who purports to have personal knowledge of the facts pertaining to the issues in dispute, even though the appellant shows by uncontradicted testimony that the former officer is no longer employed by the corporation and that his present whereabouts are unknown-----

107

Dismissal

1. An appellant's motion for reconsideration of a decision in which a hearing was scheduled for the purpose of establishing whether the board has jurisdiction over a claim for unnecessary acceleration of construction costs is denied where it is found that a crucial allegation made by appellant is contradicted by information furnished to the contracting officer in support of the claim and that the evidence to be developed at a hearing may resolve the apparent contradiction and the jurisdictional questions presented-----
2. A government motion for reconsideration of a decision dismissing a contractor's claim for loss of commercial business as sounding in breach of contract is denied where the Government alleges that the claim could have been stated in such terms as to be cognizable as a claim arising under the contract but the claim as actually submitted is clearly not, in fact, cognizable thereunder, and the Government fails to show that there are material facts in dispute which could confer jurisdiction or that scheduling a hearing would otherwise serve any useful purpose-----
3. A claim first presented at the hearing of an appeal will be dismissed as being outside of the jurisdiction of the Board-----
4. Where a general release executed on settlement of amounts due under a contract contains exceptions as to certain pending claims but fails to reserve a claim previously made, because of alleged inadvertence on the part of the contractor, such omission precludes consideration of the merits of the claim by the Board and requires its dismissal as being outside of the Board's jurisdiction-----
5. Where delays occur in the performance of the contractor's work pending decisions by the Government on questions concerning drawings and specifications, due to alleged lack of Government supervision,

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RULES OF PRACTICE—Continued

APPEALS—Continued

Dismissal—Continued

or because of the actions of other contractors, an appeal based on such claims will be dismissed as being outside the Board's jurisdiction, in the absence of a contract provision of the "pay for delay" type-----	Page 305
6. Under a contract modification agreement for equitable adjustment purporting to settle and release claims presented by the contractor as additional expenses of coping with conditions encountered in constructing foundations of a building, an appeal based on the allegation that the contractor is entitled to additional compensation, for the reason that the conditions so encountered were alleged to be changed conditions, will be dismissed, since the Board has no authority to reform a contract-----	305
7. A claim for additional compensation based on alleged unreasonable delay by the Government in issuing a notice to proceed will be dismissed as being outside the jurisdiction of the Board-----	305
8. A mistake-in-bid claim previously ruled upon adversely by the Comptroller General was dismissed by the Board since, irrespective of the legal theory relied upon (e.g., the Law of Restitution and particularly the theory of Unjust Enrichment), the Board is without jurisdiction in the matter-----	306

EVIDENCE

1. In cases involving a hearing the weight to be given to documents included in the appeal file on controverted issues is dependent upon the nature of the evidence offered in support by the party concerned; hence, the Board will accord only limited weight to the uncorroborated portion of an affidavit of a former officer of the appellant corporation who purports to have personal knowledge of the facts pertaining to the issues in dispute, even though the appellant shows by uncontradicted testimony that the former officer is no longer employed by the corporation and that his present whereabouts are unknown-----	107
2. A motion by appellant for an order directing the Government to produce for inspection and copying, documents relating to the drafting, approval and promulgation of certain regulations will be denied without prejudice to its later renewal where it appears that the appellant has not taken advantage of inspection and copying rights accorded by the Government bodies in possession of such documents, in accordance with the regulations of those agencies-----	157
3. The overriding consideration in ruling upon requests for discovery is whether making available the information sought is consistent with the objective of securing just and inexpensive determination of appeals without unnecessary delay, with consideration given to (i) the attainment of that objective in the particular case; (ii) the showing made by the party seeking discovery; (iii) the claims of privilege asserted; and (iv) the likelihood of hardship resulting from granting particular requests. Absent hardship and privilege, the scope of inquiry may encompass any	

RULES OF PRACTICE—Continued

EVIDENCE—Continued

material relevant to the subject matter and need not be limited to the precise issues involved, even though such material may not be admissible as evidence at the hearing-----	Page 178
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HEARINGS

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| 1. An appellant's motion for reconsideration of a decision in which a hearing was scheduled for the purpose of establishing whether the board had jurisdiction over a claim for unnecessary acceleration of construction costs is denied where it is found that a crucial allegation made by appellant is contradicted by information furnished to the contracting officer in support of the claim and that the evidence to be developed at a hearing may resolve the apparent contradiction and the jurisdictional questions presented-- | 15 |
| 2. A government motion for reconsideration of a decision dismissing a contractor's claim for loss of commercial business as sounding in breach of contract is denied where the Government alleges that the claim could have been stated in such terms as to be cognizable as a claim arising under the contract but the claim as actually submitted is clearly not, in fact, cognizable thereunder, and the Government fails to show that there are material facts in dispute which could confer jurisdiction or that scheduling a hearing would otherwise serve any useful purpose----- | 16 |

WITNESSES

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| 1. In cases involving a hearing the weight to be given to documents included in the appeal file on controverted issues is dependent upon the nature of the evidence offered in support by the party concerned; hence, the Board will accord only limited weight to the uncorroborated portion of an affidavit of a former officer of the appellant corporation who purports to have personal knowledge of the facts pertaining to the issues in dispute, even though the appellant shows by uncontradicted testimony that the former officer is no longer employed by the corporation and that his present whereabouts are unknown----- | 107 |
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SCRIP

VALUATION OF LAND

- | | |
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| 1. In determining what land is to be classified under section 7 of the Taylor Grazing Act and the act of Aug. 31, 1964, as suitable for the satisfaction of scrip, including soldiers' additional homestead rights, the Secretary may fix a maximum value per acre as one of the factors to be considered and reject applications for lands whose per acre value is in excess of the maximum limitation----- | 400 |
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SECRETARY OF THE INTERIOR

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| 1. Where the Secretary has agreed to a plan to remove possible objections to the authority of the General Services Administration to sell certain oil and gas deposits and the deposits are disposed in accordance with the plan, it is within his discretionary authority to reject offers to lease the deposits under the Mineral Leasing Act for Acquired Lands, whether or not the sale was legally proper----- | 133 |
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SECRETARY OF THE INTERIOR--Continued

Page

2. The Secretary may in the exercise of his discretionary authority reject noncompetitive offers to lease oil and gas deposits in acquired lands if he determines that leasing would be detrimental to the public interest without regard to the propriety of the disposition of the deposits under another statute.----- 133

SOLDIERS' ADDITIONAL HOMESTEADS

CLASSIFICATION

1. In determining what land is to be classified under section 7 of the Taylor Grazing Act and the act of Aug. 31, 1964, as suitable for the satisfaction of scrip, including soldiers' additional homestead rights, the Secretary may fix a maximum value per acre as one of the factors to be considered and reject applications for lands whose per acre value is in excess of the maximum limitation.---- 400

STATUTORY CONSTRUCTION

GENERALLY

1. The Wilderness Act was not intended to lower the existing standards with respect to units of the national park and national wildlife refuge systems.----- 97
2. Designation of an area as wilderness by act of Congress is a Congressional withdrawal of the area from "public land" status and brings into application certain sections of the Wilderness Act prohibiting, *inter alia*, commercial enterprises and permanent roads ----- 97
3. The Classification and Multiple Use Act of Sept. 19, 1964 (78 Stat. 986; 43 U.S.C. secs. 1411-18) authorizes, under certain circumstances, the segregation of public land from appropriation under the general mining laws, but it does not provide authority to restrict or condition the mining activities authorized by the general mining laws----- 187

LEGISLATIVE HISTORY

1. The language of the Wilderness Act and its legislative history indicate that Congress did not intend to open up to mining, oil and gas leasing, water resource projects, and other commercial activities areas that are now closed to such activities. Regarding areas where such activities now occur, proposed legislation recommending wilderness status to an area open to mining, oil and gas leasing, water resource projects or reclamation authorizations should contain an express provision terminating or authorizing these activities, since the Congressional intention on this issue is not clear.----- 97

SURFACE RESOURCES ACT

GENERALLY

1. Where a mining claimant files a verified statement pursuant to a proceeding initiated by the Forest Service in accordance with section 5 of the Surface Resources Act and the Forest Service subsequently recommends the initiation of a contest proceeding under the general mining laws to determine the validity of the claim (rather than a proceeding under section 5(c) of the act to determine the Government's right to manage the surface resources), since the responsibility for the administration of the use and oc-

SURFACE RESOURCES ACT—Continued

GENERALLY—Continued

cupancy of the national forests is vested in the Department of Agriculture, this Department is without the authority to inquire into the reasons or justifications for the initiation of such a proceeding and is without the authority to change, as a matter of its own policy, the nature of the proceeding from the one recommended by the Forest Service-----

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SURVEYS OF PUBLIC LANDS

GENERALLY

1. A description in an acquired lands oil and gas lease offer of a parcel of land smaller than a quarter-quarter section embraced within a public land survey and purportedly in conformity with it must describe the subdivisions of the quarter-quarter section in the same manner as larger subdivisions of a section and quarter-section would be described, and cannot merely give a proportionate ratio, such as the "E3/4" of the quarter-quarter section, unrelated to the quadrant method upon which the public land surveys are based and understood-----
2. Where an island which was once public land owned by the United States is gradually eroded away in its entirety by the force of the river in which it lay and then fast land is formed on the site formerly occupied by the island by the process of accretion to a bank of the river which is privately owned, the United States can not assert title to such land as public land-----

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TAYLOR GRAZING ACT

CLASSIFICATION

1. In determining what land is to be classified under section 7 of the Taylor Grazing Act and the act of Aug. 31, 1964, as suitable for the satisfaction of scrip, including soldiers' additional homestead rights, the Secretary may fix a maximum value per acre as one of the factors to be considered and reject applications for lands whose per acre value is in excess of the maximum limitation-----

400

WATER POLLUTION CONTROL

WATER QUALITY STANDARDS

Generally

1. Water Quality Act, Oct. 2, 1965, 79 Stat. 903, which amends the Federal Water Pollution Control Act, July 9, 1956, 70 Stat. 498, as amended, 33 U.S.C. sec. 466 *et seq.*, provides a first option to the States to establish water quality standards prior to June 30, 1967-----
2. After June 30, 1967, the States and the Secretary have authority to initiate action toward the establishment of water quality standards-----
3. The Secretary, pursuant to section 10(c)(1) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. sec. 466g, has authority to determine that a portion of water quality standards established by a State meets the criteria of section 10(c)(3) of that Act, while determining the remainder of such water quality standards fail to meet such criteria-----

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WITHDRAWALS AND RESERVATIONS

GENERALLY

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| | Page |
| 1. Where, subsequent to survey, lands have formed by accretion in front of lots which are part of an area withdrawn from entry under the public land laws and placed under the administrative jurisdiction of an agency of the Federal Government, the administering agency acquires jurisdiction over the accreted lands, and the lands become subject to the same restricted usage as the lands to which they are accreted..... | 142 |

EFFECT OF

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| 1. Mining claims located on land withdrawn from such entry are null and void <i>ab initio</i> and will not be validated by the modification or revocation of the order of withdrawal to open the land thereafter to mineral entry..... | 141 |
| 2. Lands to which have been withdrawn from entry under some or all of the public land laws remain so withdrawn until the revocation or modification of the order of withdrawal, and it is immaterial whether the lands are presently being, or have ever been, used for the purpose for which they were withdrawn..... | 142 |
| 3. Mining claims are properly declared to be null and void <i>ab initio</i> where they were located on lands withdrawn for reclamation purposes; the withdrawal cannot be deemed to have expired merely because it was stated to be for a temporary purpose and more than 19 years had elapsed before the first of the claims was located..... | 386 |

RECLAMATION WITHDRAWALS

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| 1. Mining claims are properly declared to be null and void <i>ab initio</i> where they were located on lands withdrawn for reclamation purposes; the withdrawal cannot be deemed to have expired merely because it was stated to be for a temporary purpose and more than 19 years had elapsed before the first of the claims was located..... | 386 |
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REVOCATION AND RESTORATION

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| 1. Where an order revoking a withdrawal and restoring land to entry specifies that it is to be effective on a future date the status of the land remains unchanged until that date, and the land remains, during the interval between issuance of the order and the effective date provided therein, closed to the types of entry from which it has been withdrawn..... | 142 |
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TEMPORARY WITHDRAWALS

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| 1. Mining claims are properly declared to be null and void <i>ab initio</i> where they were located on lands withdrawn for reclamation purposes; the withdrawal cannot be deemed to have expired merely because it was stated to be for a temporary purpose and more than 19 years had elapsed before the first of the claims was located..... | 386 |
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WORDS AND PHRASES

Page

1. A color of title claim cannot be initiated on land withdrawn pursuant to a statute granting land in aid of construction of a railroad; such land is not "public land" within the meaning of the Color of Title Act.-----
2. "*Legal Subdivision*." It is not proper to reject an oil and gas lease offer which describes land in one section as the NW $\frac{1}{4}$ and land in another section as the N $\frac{1}{2}$, where each section is irregular and the NW $\frac{1}{4}$ of one has been subdivided wholly into lots and the N $\frac{1}{2}$ of the other has been partially subdivided into lots, on the ground that the offer failed to describe the land by "legal subdivision" in accordance with the latest plat of survey, where that term has been used to include fractional as well as regular subdivisions.-----

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